# MONTANA

# CODE

# ANNOTATED

1978

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# TITLE 70

## PROPERTY

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## PROPERTY IN GENERAL
## REAL AND PERSONAL

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## Part 1

## General Provisions

**70-1-101. Property defined — ownership.** The ownership of a thing is the right of one or more persons to possess and use it to the exclusion of others. In this code, the thing of which there may be ownership is called property.

**History: En. Sec. 1070, Civ. C. 1895; re-en. Sec. 4421, Rev. C. 1907; re-en. Sec. 6663, R.C.M. 1921; Cal. Civ. C. Sec. 654; Field Civ. C. Sec. 159; re-en. Sec. 6663, R.C.M. 1935; R.C.M. 1947, 67-201.**

**70-1-102. Ownership public or private — state as private proprietor.** All property has an owner, whether that owner is the state and the property public or the owner an individual and the property private. The state may also hold property as a private proprietor.

**History: En. Sec. 1090, Civ. C. 1895; re-en. Sec. 4431, Rev. C. 1907; re-en. Sec. 6673, R.C.M. 1921; Cal. Civ. C. Sec. 669; Field Civ. C. Sec. 168; re-en. Sec. 6673, R.C.M. 1935; R.C.M. 1947, 67-301.**

**70-1-103. Owner entitled to products and accessions.** The owner of a thing also owns all of its products and accessions.

**History: En. Sec. 1170, Civ. C. 1895; re-en. Sec. 4472, Rev. C. 1907; re-en. Sec. 6714, R.C.M. 1921; Cal. Civ. C. Sec. 732; Field Civ. C. Sec. 209; re-en. Sec. 6714, R.C.M. 1935; R.C.M. 1947, 67-415.**

**70-1-104. In what things property interests may exist.** There may be ownership of:

(1) all inanimate things which are capable of appropriation or of manual delivery;
(2) all domestic animals;
(3) all obligations;
(4) such products of labor or skill as the composition of an author, the goodwill of a business, trademarks, and signs; and
(5) rights created or granted by statute.

**History: En. Sec. 1071, Civ. C. 1895; re-en. Sec. 4422, Rev. C. 1907; re-en. Sec. 6664, R.C.M. 1921; Cal. Civ. C. Sec. 655; Field Civ. C. Sec. 160; re-en. Sec. 6664, R.C.M. 1935; R.C.M. 1947, 67-202.**

**70-1-105. Real or personal.** Property is either:

(1) real or immovable; or
(2) personal or movable.

**History: En. Sec. 1073, Civ. C. 1895; re-en. Sec. 4424, Rev. C. 1907; re-en. Sec. 6666, R.C.M. 1921; Cal. Civ. C. Sec. 657; Field Civ. C. Sec. 162; re-en. Sec. 6666, R.C.M. 1935; R.C.M. 1947, 67-206.**

**70-1-106. Real property defined.** Real or immovable property consists of:

(1) land;
(2) that which is affixed to land;
(3) that which is incidental or appurtenant to land;
(4) that which is immovable by law.

**History: En. Sec. 1074, Civ. C. 1895; re-en. Sec. 4425, Rev. C. 1907; re-en. Sec. 6667, R.C.M. 1921; Cal. Civ. C. Sec. 658; Based on Field Civ. C. Sec. 163; re-en. Sec. 6667, R.C.M. 1935; R.C.M. 1947, 67-207.**

**70-1-107. Choice of law as to real property.** Real property within this state is governed by the law of this state, except where the title is in the United States.

**History: En. Sec. 1200, Civ. C. 1895; re-en. Sec. 4480, Rev. C. 1907; re-en. Sec. 6722, R.C.M. 1921; Cal. Civ. C. Sec. 755; re-en. Sec. 6722, R.C.M. 1935; R.C.M. 1947, 67-501.**

**70-1-108. Personal property defined.** Every kind of property that is not real is personal.

**History: En. Sec. 1079, Civ. C. 1895; re-en. Sec. 4430, Rev. C. 1907; re-en. Sec. 6672, R.C.M. 1921; Cal. Civ. C. Sec. 663; Field Civ. C. Sec. 167; re-en. Sec. 6672, R.C.M. 1935; R.C.M. 1947, 67-212.**

**70-1-109. Choice of law as to personal property.** If there is no law to the contrary in the place where personal property is situated, it is deemed to follow the person of its owner and is governed by the law of his domicile.

**History: En. Sec. 1340, Civ. C. 1895; re-en. Sec. 4556, Rev. C. 1907; re-en. Sec. 6803, R.C.M. 1921; Cal. Civ. C. Sec. 946; Field Civ. C. Sec. 364; re-en. Sec. 6803, R.C.M. 1935; R.C.M. 1947, 67-1101.**

**70-1-110. How property acquired.** Property is acquired by:

(1) occupancy;
(2) accession;
(3) transfer;
(4) will; or
(5) succession.

**History: En. Sec. 1380, Civ. C. 1895; re-en. Sec. 4569, Rev. C. 1907; re-en. Sec. 6816, R.C.M. 1921; Cal. Civ. C. Sec. 1000; re-en. Sec. 6816, R.C.M. 1935; R.C.M. 1947, 67-1201.**

## Part 2

## General Rights of State Over Property

**70-1-201. Original and ultimate title.** The original and ultimate right of all property, real and personal, within the jurisdiction of this state and not belonging to the United States is in the people of the state.

**History: En. Sec. 60, Pol. C. 1895; re-en. Sec. 26, Rev. C. 1907; re-en. Sec. 27, R.C.M. 1921; Cal. Pol. C. Sec. 40; re-en. Sec. 27, R.C.M. 1935; R.C.M. 1947, 67-101.**

**70-1-202. Property of the state — what included.** The state is the owner of:

(1) all land below the water of a navigable lake or stream;
(2) all property lawfully appropriated by it to its own use;
(3) all property dedicated or granted to the state; and
(4) all property of which there is no other owner.

**History: En. Sec. 1091, Civ. C. 1895; re-en. Sec. 4432, Rev. C. 1907; re-en. Sec. 6674, R.C.M. 1921; Cal. Civ. C. Sec. 670; Based on Field Civ. C. Sec. 169; re-en. Sec. 6674, R.C.M. 1935; R.C.M. 1947, 67-302.**

**70-1-203. Escheat.** Whenever the title to any property fails for want of heirs or next of kin, it reverts to the state. All property within the limits of this state which does not belong to any person belongs to the state.

**History: En. Sec. 61, Pol. C. 1895; re-en. Sec. 27, Rev. C. 1907; re-en. Sec. 28, R.C.M. 1921; Cal. Pol. C. Sec. 41; re-en. Sec. 28, R.C.M. 1935; R.C.M. 1947, 67-102.**

**70-1-204. Acquisition by taxation.** The state or any county thereof may acquire property by taxation in the modes authorized by law.

**History: En. Sec. 62, Pol. C. 1895; re-en. Sec. 28, Rev. C. 1907; re-en. Sec. 29, R.C.M. 1921; Cal. Pol. C. Sec. 43; re-en. Sec. 29, R.C.M. 1935; R.C.M. 1947, 67-103.**

**70-1-205. Eminent domain.** The state may acquire or authorize others to acquire title to property, real or personal, for public use, in the cases and in the modes provided in chapter 30 of this title.

**History: En. Sec. 63, Pol. C. 1895; re-en. Sec. 29, Rev. C. 1907; re-en. Sec. 30, R.C.M. 1921; Cal. Pol. C. Sec. 44; re-en. Sec. 30, R.C.M. 1935; R.C.M. 1947, 67-104.**

## Part 3

## Kinds of Ownership Interests

**70-1-301. Interests in real property specially named elsewhere.** In respect to real or immovable property, the interests mentioned in this part are denominated estates and are specially named and classified in 70-15-202 through 70-17-111 and in Title 72, chapter 24.

**History: En. Sec. 1122, Civ. C. 1895; re-en. Sec. 4455, Rev. C. 1907; re-en. Sec. 6697, R.C.M. 1921; Cal. Civ. C. Sec. 701; Field Civ. C. Sec. 193; re-en. Sec. 6697, R.C.M. 1935; R.C.M. 1947, 67-327.**

**70-1-302. Ownership — absolute or qualified.** The ownership of property is either:
(1) absolute; or
(2) qualified.

**History: En. Sec. 1100, Civ. C. 1895; re-en. Sec. 4433, Rev. C. 1907; re-en. Sec. 6675, R.C.M. 1921; Cal. Civ. C. Sec. 678; Field Civ. C. Sec. 171; re-en. Sec. 6675, R.C.M. 1935; R.C.M. 1947, 67-303.**

**70-1-303. When ownership absolute.** The ownership of property is absolute when a single person has the absolute dominion over it and may use it or dispose of it according to his pleasure, subject only to general laws.

**History: En. Sec. 1101, Civ. C. 1895; re-en. Sec. 4434, Rev. C. 1907; re-en. Sec. 6676, R.C.M. 1921; Cal. Civ. C. Sec. 679; Field Civ. C. Sec. 172; re-en. Sec. 6676, R.C.M. 1935; R.C.M. 1947, 67-304.**

**70-1-304. When ownership qualified.** The ownership of property is qualified when:
(1) it is shared with one or more persons;
(2) the time of enjoyment is deferred or limited;
(3) the use is restricted.

**History: En. Sec. 1102, Civ. C. 1895; re-en. Sec. 4435, Rev. C. 1907; re-en. Sec. 6677, R.C.M. 1921; Cal. Civ. C. Sec. 680; Field Civ. C. Sec. 173; re-en. Sec. 6677, R.C.M. 1935; R.C.M. 1947, 67-305.**

**70-1-305. Ownership by single person.** The ownership of property by a single person is designated as a sole or several ownership.

**History: En. Sec. 1103, Civ. C. 1895; re-en. Sec. 4436, Rev. C. 1907; re-en. Sec. 6678, R.C.M. 1921; Cal. Civ. C. Sec. 681; Field Civ. C. Sec. 174; re-en. Sec. 6678, R.C.M. 1935; R.C.M. 1947, 67-306.**

**70-1-306. Ownership by several persons — types.** The ownership of property by several persons is either of:
(1) joint interests;
(2) partnership interests;
(3) interests in common.

**History: En. Sec. 1104, Civ. C. 1895; re-en. Sec. 4437, Rev. C. 1907; re-en. Sec. 6679, R.C.M. 1921; Cal. Civ. C. Sec. 682; Field Civ. C. Sec. 175; re-en. Sec. 6679, R.C.M. 1935; R.C.M. 1947, 67-307.**

**70-1-307. Joint interest defined.** A joint interest is one owned by several persons in equal shares by a title created by a single will or transfer, when expressly declared in the will or transfer to be a joint tenancy or when granted or devised to executors or trustees as joint tenants.

**History: En. Sec. 1105, Civ. C. 1895; re-en. Sec. 4438, Rev. C. 1907; re-en. Sec. 6680, R.C.M. 1921; Cal. Civ. C. Sec. 683; Based on Field Civ. C. Sec. 176; re-en. Sec. 6680, R.C.M. 1935; R.C.M. 1947, 67-308.**

**70-1-308. Safe deposit box — joint tenancy.** When so specified in the agreement granting for a term of time the right in two or more persons to use or occupy any safe or box, commonly referred to as a safe deposit vault or box for the safekeeping of valuables, such interest and estate created in the grantees shall be a joint tenancy in such vault or box and pass to the survivors and survivor upon the death of one or more of the joint tenants with right in such survivors and survivor to have access to and possession of such vault or box and the contents thereof under the terms of the agreement.

**History: En. Sec. 1, Ch. 62, L. 1939; R.C.M. 1947, 67-309.**

**70-1-309. Distribution when joint tenant fails to survive by 120 hours.** (1) Whenever property is held in joint tenancy by two joint tenants and the joint tenants die within 120 hours of each other or it cannot be determined whether one survived the other by 120 hours, the property shall be distributed one-half to the estate of one joint tenant and one-half to the estate of the other joint tenant.

(2) Whenever property is held in joint tenancy by more than two joint tenants and the last surviving joint tenant does not survive all of the other joint tenants by 120 hours or it cannot be determined whether he so survived for 120 hours, the property shall be distributed equally among the estates of the last surviving joint tenant and the joint tenants which he failed to survive by 120 hours.

**History: En. 67-308.1 by Sec. 1, Ch. 75, L. 1977; R.C.M. 1947, 67-308.1.**

**70-1-310. Action by or against joint tenants or tenants in common.** All persons holding as tenants in common, joint tenants, or any number less than all may jointly or severally commence or defend any civil action or proceeding for the enforcement or protection of the rights of such party. In all cases one tenant in common or joint tenant can sue his cotenant.

**History: En. Sec. 21, p. 43, L. 1877; re-en. Sec. 21, 1st Div. Rev. Stat. 1879; re-en. Sec. 21, 1st Div. Comp. Stat. 1887; amd. Sec. 586, C. Civ. Proc. 1895; re-en. Sec. 6493, Rev. C. 1907; re-en. Sec. 9085, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 384; re-en. Sec. 9085, R.C.M. 1935; R.C.M. 1947, 93-2823.**

**70-1-311. Abuse of property held jointly or in common — action — mining property.** If any person shall assume and exercise exclusive ownership over or take away, destroy, lessen in value, or otherwise injure or abuse any property held in joint tenancy or tenancy in common, the party aggrieved shall have his action for the injury in the same manner as he would have if such joint tenancy or tenancy in common did not exist; provided that nothing herein contained shall prevent one cotenant or joint tenant or any number of cotenants or joint tenants acting together less than all from entering on the common property at any point or points not then in the actual occupancy of the nonjoining cotenants or joint tenants and enjoying all rights of occupancy of the property, without waste and, in the case of mining property, from mining the same in a minerlike manner and extracting, milling, and disposing of the ore from the common property, paying its or their own expenses and subject to accounting to the nonjoining cotenant or joint tenant for the net profits of such mining operations, if any made, and all liens for labor and materials incurred in such mining shall attach only to the undivided interest or interests of the working cotenants or joint tenants, but nothing herein shall prevent or preclude the cotenant or joint tenant, not joining in the operation of such mining property, from receiving his, its, or their proportionate share of all ore or ores on the dump upon payment or tendering payment of the actual cost of mining the same.

**History: En. Sec. 2, p. 454, Bannack Stat.; re-en. Sec. 2, p. 504, Cod. Stat. 1871; re-en. Sec. 771, 5th Div. Rev. Stat. 1879; re-en. Sec. 1285, 5th Div. Comp. Stat.**

**1887; amd. Sec. 592, C. Civ. Proc. 1895; en. Sec. 1, p. 134, L. 1899; re-en. Sec. 6499, Rev. C. 1907; re-en. Sec. 9091, R.C.M. 1921; re-en. Sec. 9091, R.C.M. 1935; R.C.M. 1947, 93-2829.**

**70-1-312. Partnership interest defined.** A partnership interest is one owned by several persons in partnership for partnership purposes.

**History: En. Sec. 1106, Civ. C. 1895; re-en. Sec. 4439, Rev. C. 1907; re-en. Sec. 6681, R.C.M. 1921; Cal. Civ. C. Sec. 684; Field Civ. C. Sec. 177; re-en. Sec. 6681, R.C.M. 1935; R.C.M. 1947, 67-311.**

**70-1-313. Interest in common defined.** An interest in common is one owned by several persons, not in joint ownership or partnership.

**History: En. Sec. 1107, Civ. C. 1895; re-en. Sec. 4440, Rev. C. 1907; re-en. Sec. 6682, R.C.M. 1921; Cal. Civ. C. Sec. 685; Field Civ. C. Sec. 178; re-en. Sec. 6682, R.C.M. 1935; R.C.M. 1947, 67-312.**

**70-1-314. Interest in common — how created.** Every interest created in favor of several persons in their own right, including husband and wife, is an interest in common unless acquired by them in partnership for partnership purposes or unless declared in its creation to be a joint interest, as provided in 70-1-307.

**History: En. Sec. 1108, Civ. C. 1895; re-en. Sec. 4441, Rev. C. 1907; re-en. Sec. 6683, R.C.M. 1921; Cal. Civ. C. Sec. 686; Based on Field Civ. C. Sec. 179; re-en. Sec. 6683, R.C.M. 1935; R.C.M. 1947, 67-313.**

**70-1-315. Interest as to time of enjoyment.** In respect to the time of enjoyment, an interest in property is either:

(1) present or future; and

(2) perpetual or limited.

**History: En. Sec. 1109, Civ. C. 1895; re-en. Sec. 4442, Rev. C. 1907; re-en. Sec. 6684, R.C.M. 1921; Cal. Civ. C. Sec. 688; Field Civ. C. Sec. 180; re-en. Sec. 6684, R.C.M. 1935; R.C.M. 1947, 67-314.**

**70-1-316. Present interest — to what entitles owner.** A present interest entitles the owner to the immediate possession of the property.

**History: En. Sec. 1110, Civ. C. 1895; re-en. Sec. 4443, Rev. C. 1907; re-en. Sec. 6685, R.C.M. 1921; Cal. Civ. C. Sec. 689; Field Civ. C. Sec. 181; re-en. Sec. 6685, R.C.M. 1935; R.C.M. 1947, 67-315.**

**70-1-317. Future interest — to what entitles owner.** A future interest entitles the owner to the possession of the property only at a future period.

**History: En. Sec. 1111, Civ. C. 1895; re-en. Sec. 4444, Rev. C. 1907; re-en. Sec. 6686, R.C.M. 1921; Cal. Civ. C. Sec. 690; Field Civ. C. Sec. 182; re-en. Sec. 6686, R.C.M. 1935; R.C.M. 1947, 67-316.**

**70-1-318. What future interests recognized.** No future interest in property is recognized by the law, except such as is defined in this code.

**History: En. Sec. 1124, Civ. C. 1895; re-en. Sec. 4457, Rev. C. 1907; re-en. Sec. 6699, R.C.M. 1921; Cal. Civ. C. Sec. 703; Field Civ. C. Sec. 195; re-en. Sec. 6699, R.C.M. 1935; R.C.M. 1947, 67-329.**

**70-1-319. Mere possibility not an interest.** A mere possibility, such as the expectancy of an heir apparent, is not to be deemed an interest of any kind.

**History: En. Sec. 1121, Civ. C. 1895; re-en. Sec. 4454, Rev. C. 1907; re-en. Sec. 6696, R.C.M. 1921; Cal. Civ. C. Sec. 700; Field Civ. C. Sec. 192; re-en. Sec. 6696, R.C.M. 1935; R.C.M. 1947, 67-326.**

**70-1-320. Perpetual interest — duration.** A perpetual interest has a duration equal to that of the property.

**History: En. Sec. 1112, Civ. C. 1895; re-en. Sec. 4445, Rev. C. 1907; re-en. Sec. 6687, R.C.M. 1921; Cal. Civ. C. Sec. 691; Field Civ. C. Sec. 183; re-en. Sec. 6687, R.C.M. 1935; R.C.M. 1947, 67-317.**

**70-1-321. Limited interest — duration.** A limited interest has a duration of less than that of the property.

**History: En. Sec. 1113, Civ. C. 1895; re-en. Sec. 4446, Rev. C. 1907; re-en. Sec. 6688, R.C.M. 1921; Cal. Civ. C. Sec. 692; Field Civ. C. Sec. 184; re-en. Sec. 6688, R.C.M. 1935; R.C.M. 1947, 67-318.**

**70-1-322. Kinds of future interests.** A future interest is either:
(1) vested; or
(2) contingent.

**History: En. Sec. 1114, Civ. C. 1895; re-en. Sec. 4447, Rev. C. 1907; re-en. Sec. 6689, R.C.M. 1921; Cal. Civ. C. Sec. 693; Field Civ. C. Sec. 185; re-en. Sec. 6689, R.C.M. 1935; R.C.M. 1947, 67-319.**

**70-1-323. Future interest — when vested.** A future interest is vested when there is a person in being who would have a right, defeasible or indefeasible, to the immediate possession of the property upon the ceasing of the intermediate or precedent interest.

**History: En. Sec. 1115, Civ. C. 1895; re-en. Sec. 4448, Rev. C. 1907; re-en. Sec. 6690, R.C.M. 1921; Cal. Civ. C. Sec. 694; Field Civ. C. Sec. 186; re-en. Sec. 6690, R.C.M. 1935; R.C.M. 1947, 67-320.**

**70-1-324. Future interest — when contingent.** A future interest is contingent whilst the person in whom or the event upon which it is limited to take effect remains uncertain.

**History: En. Sec. 1116, Civ. C. 1895; re-en. Sec. 4449, Rev. C. 1907; re-en. Sec. 6691, R.C.M. 1921; Cal. Civ. C. Sec. 695; Field Civ. C. Sec. 187; re-en. Sec. 6691, R.C.M. 1935; R.C.M. 1947, 67-321.**

**70-1-325. Two or more alternative future interests.** Two or more future interests may be created to take effect in the alternative so that if the first in order fails to vest, the next in succession shall be substituted for it and take effect accordingly.

**History: En. Sec. 1117, Civ. C. 1895; re-en. Sec. 4450, Rev. C. 1907; re-en. Sec. 6692, R.C.M. 1921; Cal. Civ. C. Sec. 696; Field Civ. C. Sec. 188; re-en. Sec. 6692, R.C.M. 1935; R.C.M. 1947, 67-322.**

**70-1-326. Future interests — how passed.** Future interests pass by succession, will, and transfer in the same manner as present interests.

**History: En. Sec. 1120, Civ. C. 1895; re-en. Sec. 4453, Rev. C. 1907; re-en. Sec. 6695, R.C.M. 1921; Cal. Civ. C. Sec. 699; Field Civ. C. Sec. 191; re-en. Sec. 6695, R.C.M. 1935; R.C.M. 1947, 67-325.**

## Part 4

## Conditions and Limitations of Ownership

**70-1-401. Fixing time of enjoyment — computation — condition.** The time when the enjoyment of property is to begin or end may be determined by computation, to be made to depend on event. In the latter case, the enjoyment is said to be upon condition.

**History: En. Sec. 1140, Civ. C. 1895; re-en. Sec. 4458, Rev. C. 1907; re-en. Sec. 6700, R.C.M. 1921; Cal. Civ. C. Sec. 707; Field Civ. C. Sec. 196; re-en. Sec. 6700, R.C.M. 1935; R.C.M. 1947, 67-401.**

**70-1-402. Kinds of conditions.** Conditions are precedent or subsequent. The former fix the beginning, the latter the ending, of the right.

**History: En. Sec. 1141, Civ. C. 1895; re-en. Sec. 4459, Rev. C. 1907; re-en. Sec. 6701, R.C.M. 1921; Cal. Civ. C. Sec. 708; Field Civ. C. Sec. 197; re-en. Sec. 6701, R.C.M. 1935; R.C.M. 1947, 67-402.**

**70-1-403. Condition precedent requiring wrongful act.** If a condition precedent requires the performance of an act wrong of itself, the instrument containing it is so far void and the right cannot exist. If it requires the performance of an act not wrong of itself, but otherwise unlawful, the instrument takes effect and the condition is void.

**History: En. Sec. 1142, Civ. C. 1895; re-en. Sec. 4460, Rev. C. 1907; re-en. Sec. 6702, R.C.M. 1921; Cal. Civ. C. Sec. 709; Field Civ. C. Sec. 198; re-en. Sec. 6702, R.C.M. 1935; R.C.M. 1947, 67-403.**

**70-1-404. Conditions restraining marriage void.** Conditions imposing restraints upon marriage, except upon the marriage of a minor, are void, but this does not affect limitations where the intent was not to forbid marriage but only to give the use until marriage.

**History: En. Sec. 1143, Civ. C. 1895; re-en. Sec. 4461, Rev. C. 1907; re-en. Sec. 6703, R.C.M. 1921; Cal. Civ. C. Sec. 710; Based on Field Civ. C. Sec. 199; re-en. Sec. 6703, R.C.M. 1935; R.C.M. 1947, 67-404.**

**70-1-405. Conditions restraining alienation void.** Conditions restraining alienation, when repugnant to the interest created, are void.

**History: En. Sec. 1144, Civ. C. 1895; re-en. Sec. 4462, Rev. C. 1907; re-en. Sec. 6704, R.C.M. 1921; Cal. Civ. C. Sec. 711; Field Civ. C. Sec. 200; re-en. Sec. 6704, R.C.M. 1935; R.C.M. 1947, 67-405.**

**70-1-406. How long power of alienation may be suspended.** The absolute power of alienation cannot be suspended by any limitation or condition whatever for a period longer than 21 years after some life in being at the creation of the interest and any period of gestation involved in the situation to which the limitation applies. The lives selected to govern the time of suspension must not be so numerous or so situated that evidence of their deaths is likely to be unreasonably difficult to obtain.

**History: En. Sec. 1150, Civ. C. 1895; re-en. Sec. 4463, Rev. C. 1907; re-en. Sec. 6705, R.C.M. 1921; Cal. Civ. C. Sec. 715; Based on Field Civ. C. Sec. 201; re-en. Sec. 6705, R.C.M. 1935; amd. Sec. 1, Ch. 213, L. 1959; R.C.M. 1947, 67-406(a).**

**70-1-407. Future interests suspending power of alienation void.** Every future interest is void in its creation which by any possibility may suspend the absolute power of alienation for a longer period than is prescribed in this part. Such power of alienation is suspended when there are no persons in being by whom an absolute interest in possession can be conveyed.

**History: En. Sec. 1151, Civ. C. 1895; re-en. Sec. 4464, Rev. C. 1907; re-en. Sec. 6706, R.C.M. 1921; Cal. Civ. C. Sec. 716; Field Civ. C. Sec. 202; re-en. Sec. 6706, R.C.M. 1935; amd. Sec. 2, Ch. 213, L. 1959; R.C.M. 1947, 67-407(part).**

**70-1-408. When interest must vest — rule against perpetuities.** (1) No interest in real or personal property shall be good unless it must vest not later than 21 years after some life in being at the creation of the interest and any period of gestation involved in the situation to which the limitation applies. The lives selected to govern the time of vesting must not be so numerous or so situated that evidence of their deaths is likely to be unreasonably difficult to obtain.

(2) It is intended by the enactment of this statute to make effective in this state the American common-law rule against perpetuities.

**History: En. Sec. 1150, Civ. C. 1895; re-en. Sec. 4463, Rev. C. 1907; re-en. Sec. 6705, R.C.M. 1921; Cal. Civ. C. Sec. 715; Based on Field Civ. C. Sec. 201; re-en. Sec. 6705, R.C.M. 1935; amd. Sec. 1, Ch. 213, L. 1959; R.C.M. 1947, 67-406(b).**

**70-1-409. Period of destructibility of interest not to be considered.** The period of time during which an interest is destructible pursuant to the uncontrolled volition and for the exclusive personal benefit of the person having such a power of destruction is not to be included in determining the existence of a suspension of the absolute power of alienation or the permissible period for the vesting of an interest within the rule against perpetuities.

**History: En. Sec. 1151, Civ. C. 1895; re-en. Sec. 4464, Rev. C. 1907; re-en. Sec. 6706, R.C.M. 1921; Cal. Civ. C. Sec. 716; Field Civ. C. Sec. 202; re-en. Sec. 6706, R.C.M. 1935; amd. Sec. 2, Ch. 213, L. 1959; R.C.M. 1947, 67-407(part).**

**70-1-410. Power of alienation as to trust — suspension.** The suspension of all power to alienate the subject of a trust, other than a power to exchange it for other property to be held upon the same trust or to sell it and reinvest the proceeds to be held upon the same trust, is a suspension of the power of alienation within the meaning of 70-1-406.

**History: En. Sec. 1220, Civ. C. 1895; re-en. Sec. 4491, Rev. C. 1907; re-en. Sec. 6733, R.C.M. 1921; Cal. Civ. C. Sec. 771; Field Civ. C. Sec. 228; re-en. Sec. 6733, R.C.M. 1935; R.C.M. 1947, 67-512.**

**70-1-411. Pension trusts — restrictive rules inapplicable.** (1) No statutory or common-law rule or provision relating to restraints against alienation, suspension of the power of alienation, accumulations of income, perpetuities, or remoteness of vesting shall apply to any trust created as part of a pension, retirement, insurance, savings, stock bonus, profit-sharing, or similar plan established or maintained for the benefit of employees, eligible to participate in such plan, of an employer or of a group of employers or for the benefit of the members, eligible to participate in such plan, of any labor union or of any other association or group of employees or for the benefit of other beneficiaries eligible to participate in such plan.

(2) Any such trust shall be valid, notwithstanding any such statutory or common-law rule or provision, which but for this section might otherwise be applicable to and invalidate such trust.

**History: En. Secs. 1, 2, Ch. 214, L. 1959; R.C.M. 1947, 67-423, 67-424.**

**70-1-412. Income of property defined.** The income of property, as the term is used in this part, includes the rents and profits of real property, the interest of money, dividends upon stock, and other produce of personal property.

**History: En. Sec. 1190, Civ. C. 1895; re-en. Sec. 4478, Rev. C. 1907; re-en. Sec. 6720, R.C.M. 1921; Cal. Civ. C. Sec. 748; Field Civ. C. Sec. 215; re-en. Sec. 6720, R.C.M. 1935; R.C.M. 1947, 67-421.**

**70-1-413. Dispositions of income generally — future interest rules applicable.** Dispositions of the income of the property to accrue and to be received at any time subsequent to the execution of the instrument creating such disposition are governed by the rules prescribed in parts 3 and 4 in relation to future interests.

**History: En. Sec. 1160, Civ. C. 1895; re-en. Sec. 4467, Rev. C. 1907; re-en. Sec. 6709, R.C.M. 1921; Cal. Civ. C. Sec. 722; Field Civ. C. Sec. 204; re-en. Sec. 6709, R.C.M. 1935; R.C.M. 1947, 67-410.**

**70-1-414. Accumulations of income — when void.** All directions for the accumulation of the income of property, except such as are allowed by parts 3 and 4, are void.

**History: En. Sec. 1161, Civ. C. 1895; re-en. Sec. 4468, Rev. C. 1907; re-en. Sec. 6710, R.C.M. 1921; Cal. Civ. C. Sec. 723; Field Civ. C. Sec. 205; re-en. Sec. 6710, R.C.M. 1935; R.C.M. 1947, 67-411.**

**70-1-415. Accumulations of income — period to be limited.** An accumulation of the income of property may be directed by any will, trust, or transfer in writing sufficient to pass the property or create the trust out of which the fund is to arise for the benefit of one or more persons, objects, or purposes, to commence within the time permitted for the vesting of future interests and not to extend beyond the period limiting the time within which the absolute power of alienation of property may be suspended as prescribed by law.

**History: En. Sec. 1162, Civ. C. 1895; re-en. Sec. 4469, Rev. C. 1907; re-en. Sec. 6711, R.C.M. 1921; Cal. Civ. C. Sec. 724; Field Civ. C. Sec. 206; re-en. Sec. 6711, R.C.M. 1935; amd. Sec. 1, Ch. 212, L. 1939; R.C.M. 1947, 67-412.**

**70-1-416. Direction for accumulation beyond period void in part.** If the direction for an accumulation of the income of property is for a longer term than is limited in 70-1-415, the direction only, whether separable or not from the other provisions of the instrument, is void as respects the time beyond the limit prescribed in 70-1-415, and no other part of such instrument is affected by the void portion of such direction.

**History: En. Sec. 1163, Civ. C. 1895; re-en. Sec. 4470, Rev. C. 1907; re-en. Sec. 6712, R.C.M. 1921; Cal. Civ. C. Sec. 725; Field Civ. C. Sec. 207; re-en. Sec. 6712, R.C.M. 1935; amd. Sec. 1, Ch. 144, L. 1957; R.C.M. 1947, 67-413.**

**70-1-417. Application of accumulated income to support.** When one or more persons for whose benefit an accumulation of income has been directed is or are destitute of other sufficient means of support or education, the proper court upon application may direct a suitable sum to be applied thereto out of the fund directed to be accumulated for the benefit of such person or persons.

**History: En. Sec. 1164, Civ. C. 1895; re-en. Sec. 4471, Rev. C. 1907; re-en. Sec. 6713, R.C.M. 1921; Cal. Civ. C. Sec. 726; Field Civ. C. Sec. 208; re-en. Sec. 6713, R.C.M. 1935; amd. Sec. 2, Ch. 212, L. 1939; R.C.M. 1947, 67-414.**

**70-1-418. Income accumulated during period of suspension — disposition.** When, in consequence of a valid limitation of a future interest, there is a suspension of the power of alienation or of the ownership during the continuation of which the income is undisposed of and no valid direction for its accumulation is given, such income belongs to the person presumptively entitled to the next eventual interest.

**History: En. Sec. 1171, Civ. C. 1895; re-en. Sec. 4473, Rev. C. 1907; re-en. Sec. 6715, R.C.M. 1921; Cal. Civ. C. Sec. 733; Field Civ. C. Sec. 210; re-en. Sec. 6715, R.C.M. 1935; R.C.M. 1947, 67-416.**

**70-1-419. Future interest not void for improbable contingency.** A future interest is not void merely because of the improbability of the contingency on which it is limited to take effect.

**History: En. Sec. 1118, Civ. C. 1895; re-en. Sec. 4451, Rev. C. 1907; re-en. Sec. 6693, R.C.M. 1921; Cal. Civ. C. Sec. 697; Field Civ. C. Sec. 189; re-en. Sec. 6693, R.C.M. 1935; R.C.M. 1947, 67-323.**

**70-1-420. Future interest limited to class — posthumous children.** When a future interest is limited to successors, heirs, issue, or children, posthumous children are entitled to take in the same manner as if living at the death of their parent.

**History: En. Sec. 1119, Civ. C. 1895; re-en. Sec. 4452, Rev. C. 1907; re-en. Sec. 6694, R.C.M. 1921; Cal. Civ. C. Sec. 698; Field Civ. C. Sec. 190; re-en. Sec. 6694, R.C.M. 1935; R.C.M. 1947, 67-324.**

**70-1-421. Future interest subject to defeat — how — not void.** A future interest may be defeated in any manner or by any act or means which the party creating such interest provided for or authorized in the creation thereof, nor is the future interest, thus liable to be defeated, to be on that ground adjudged void in its creation.

**History: En. Sec. 1181, Civ. C. 1895; re-en. Sec. 4475, Rev. C. 1907; re-en. Sec. 6717, R.C.M. 1921; Cal. Civ. C. Sec. 740; Field Civ. C. Sec. 212; re-en. Sec. 6717, R.C.M. 1935; R.C.M. 1947, 67-418.**

**70-1-422. Future interest contingent on death without children — how defeated.** A future interest depending on the contingency of the death of any person without successors, heirs, issue, or children is defeated by the birth of a posthumous child of such person, capable of taking by succession.

**History: En. Sec. 45, p. 486, Bannack Stat.; re-en. Sec. 45, p. 403, Cod. Stat. 1871; re-en. Sec. 222, 5th Div. Rev. Stat. 1879; re-en. Sec. 280, 5th Div. Comp. Stat. 1887; amd. Sec. 1180, Civ. C. 1895; re-en. Sec. 4474, Rev. C. 1907; re-en. Sec. 6716, R.C.M. 1921; Cal. Civ. C. Sec. 739; Field Civ. C. Sec. 211; re-en. Sec. 6716, R.C.M. 1935; R.C.M. 1947, 67-417.**

**70-1-423. Future interest not defeated by destruction of other interest.** No future interest can be defeated or barred by any alienation or other act of the owner of the intermediate or precedent interest or by destruction of such precedent interest by forfeiture, surrender, merger, or otherwise, except as provided by 70-1-424 or where a forfeiture is imposed by statute as a penalty for the violation thereof.

**History: En. Sec. 1182, Civ. C. 1895; re-en. Sec. 4476, Rev. C. 1907; re-en. Sec. 6718, R.C.M. 1921; Cal. Civ. C. Sec. 741; Field Civ. C. Sec. 213; re-en. Sec. 6718, R.C.M. 1935; R.C.M. 1947, 67-419.**

**70-1-424. Future contingent interest — termination of precedent interest.** No future interest, valid in its creation, is defeated by the determination of the precedent interest before the happening of the contingency on which the future interest is limited to take effect, but should such contingency afterwards happen, the future interest takes effect in the same manner and to the same extent as if the precedent interest had continued to the same period.

**History: En. Sec. 1183, Civ. C. 1895; re-en. Sec. 4477, Rev. C. 1907; re-en. Sec. 6719, R.C.M. 1921; Cal. Civ. C. Sec. 742; Field Civ. C. Sec. 214; re-en. Sec. 6719, R.C.M. 1935; R.C.M. 1947, 67-420.**

## Part 5

## Transfer of Property
## Grants and Their Interpretation

**70-1-501. Transfer defined.** Transfer is an act of the parties or of the law by which the title to property is conveyed from one living person to another.

**History: En. Sec. 1430, Civ. C. 1895; re-en. Sec. 4588, Rev. C. 1907; re-en. Sec. 6835, R.C.M. 1921; Cal. Civ. C. Sec. 1039; Field Civ. C. Sec. 458; re-en. Sec. 6835, R.C.M. 1935; R.C.M. 1947, 67-1501.**

**70-1-502. Voluntary transfer — applicability of contract rules.** A voluntary transfer is an executed contract subject to all rules of law concerning contracts in general, except that a consideration is not necessary to its validity.

**History: En. Sec. 1431, Civ. C. 1895; re-en. Sec. 4589, Rev. C. 1907; re-en. Sec. 6836, R.C.M. 1921; Cal. Civ. C. Sec. 1040; Field Civ. C. Sec. 459; re-en. Sec. 6836, R.C.M. 1935; R.C.M. 1947, 67-1502.**

**70-1-503. What may be transferred.** Property of any kind may be transferred, except as otherwise provided by this part.

**History: En. Sec. 1440, Civ. C. 1895; re-en. Sec. 4590, Rev. C. 1907; re-en. Sec. 6837, R.C.M. 1921; Cal. Civ. C. Sec. 1044; Field Civ. C. Sec. 460; re-en. Sec. 6837, R.C.M. 1935; R.C.M. 1947, 67-1503.**

**70-1-504. Possibility not transferable.** A mere possibility not coupled with an interest cannot be transferred.

**History: En. Sec. 1441, Civ. C. 1895; re-en. Sec. 4591, Rev. C. 1907; re-en. Sec. 6838, R.C.M. 1921; Cal. Civ. C. Sec. 1045; Field Civ. C. Sec. 461; re-en. Sec. 6838, R.C.M. 1935; R.C.M. 1947, 67-1504.**

**70-1-505. Right of reentry or repossession transferable.** A right of reentry or of repossession for breach of condition subsequent can be transferred.

**History: En. Sec. 1442, Civ. C. 1895; re-en. Sec. 4592, Rev. C. 1907; re-en. Sec. 6839, R.C.M. 1921; Cal. Civ. C. Sec. 1046; Based on Field Civ. C. Sec. 462; re-en. Sec. 6839, R.C.M. 1935; R.C.M. 1947, 67-1505.**

**70-1-506. Oral transfer permitted.** A transfer may be made without writing in every case in which a writing is not expressly required by statute.

**History: En. Sec. 1450, Civ. C. 1895; re-en. Sec. 4594, Rev. C. 1907; re-en. Sec. 6841, R.C.M. 1921; Cal. Civ. C. Sec. 1052; Field Civ. C. Sec. 463; re-en. Sec. 6841, R.C.M. 1935; R.C.M. 1947, 67-1507.**

**70-1-507. Grant defined.** A transfer in writing is called a grant or conveyance or bill of sale. The term "grant", in this part, includes all these instruments unless it is specially applied to real property.

**History: En. Sec. 1451, Civ. C. 1895; re-en. Sec. 4595, Rev. C. 1907; re-en. Sec. 6842, R.C.M. 1921; Cal. Civ. C. Sec. 1053; re-en. Sec. 6842, R.C.M. 1935; R.C.M. 1947, 67-1508.**

**70-1-508. Delivery of grant necessary.** A grant takes effect so as to vest the interest intended to be transferred only upon its delivery by the grantor.

**History: En. Sec. 1452, Civ. C. 1895; re-en. Sec. 4596, Rev. C. 1907; re-en. Sec. 6843, R.C.M. 1921; Cal. Civ. C. Sec. 1054; Field Civ. C. Sec. 465; re-en. Sec. 6843, R.C.M. 1935; R.C.M. 1947, 67-1509.**

**70-1-509. Presumption of delivery.** A grant duly executed is presumed to have been delivered at its date.

**History: En. Sec. 1453, Civ. C. 1895; re-en. Sec. 4597, Rev. C. 1907; re-en. Sec. 6844, R.C.M. 1921; Cal. Civ. C. Sec. 1055; Field Civ. C. Sec. 466; re-en. Sec. 6844, R.C.M. 1935; R.C.M. 1947, 67-1510.**

**70-1-510. Delivery to grantee necessarily absolute.** A grant cannot be delivered to the grantee conditionally. Delivery to him or to his agent as such is necessarily absolute, and the instrument takes effect thereupon, discharged of any condition on which the delivery is made.

**History: En. Sec. 1454, Civ. C. 1895; re-en. Sec. 4598, Rev. C. 1907; re-en. Sec. 6845, R.C.M. 1921; Cal. Civ. C. Sec. 1056; Field Civ. C. Sec. 467; re-en. Sec. 6845, R.C.M. 1935; R.C.M. 1947, 67-1511.**

**70-1-511. Delivery in escrow.** A grant may be deposited by the grantor with a third person, to be delivered on performance of a condition, and on delivery by the depositary, it will take effect. While in the possession of the third person and subject to condition, it is called an escrow.

**History: En. Sec. 1455, Civ. C. 1895; re-en. Sec. 4599, Rev. C. 1907; re-en. Sec. 6846, R.C.M. 1921; Cal. Civ. C. Sec. 1057; Based on Field Civ. C. Sec. 468; re-en. Sec. 6846, R.C.M. 1935; R.C.M. 1947, 67-1512.**

**70-1-512. Constructive delivery.** Though a grant be not actually delivered into the possession of the grantee, it is yet to be deemed constructively delivered in the following cases:

(1) where the instrument is, by the agreement of the parties at the time of execution, understood to be delivered and under such circumstances that the grantee is entitled to immediate delivery; or

(2) where it is delivered to a stranger for the benefit of the grantee, and his assent is shown or may be presumed.

**History: En. Sec. 1457, Civ. C. 1895; re-en. Sec. 4601, Rev. C. 1907; re-en. Sec. 6848, R.C.M. 1921; Cal. Civ. C. Sec. 1059; Field Civ. C. Sec. 470; re-en. Sec. 6848, R.C.M. 1935; R.C.M. 1947, 67-1514.**

**70-1-513. Grants — how interpreted generally.** Grants are to be interpreted in like manner with contracts in general, except so far as is otherwise provided in this part.

**History: En. Sec. 1470, Civ. C. 1895; re-en. Sec. 4602, Rev. C. 1907; re-en. Sec. 6849, R.C.M. 1921; Cal. Civ. C. Sec. 1066; Field Civ. C. Sec. 472; re-en. Sec. 6849, R.C.M. 1935; R.C.M. 1947, 67-1515.**

**70-1-514. Clear limitation not controlled by other words.** A clear and distinct limitation in a grant is not controlled by other words less clear and distinct.

**History: En. Sec. 1471, Civ. C. 1895; re-en. Sec. 4603, Rev. C. 1907; re-en. Sec. 6850, R.C.M. 1921; Cal. Civ. C. Sec. 1067; Field Civ. C. Sec. 473; re-en. Sec. 6850, R.C.M. 1935; R.C.M. 1947, 67-1516.**

**70-1-515. Recitals — when resorted to.** If the operative words of a grant are doubtful, recourse may be had to its recitals to assist the construction.

**History: En. Sec. 1472, Civ. C. 1895; re-en. Sec. 4604, Rev. C. 1907; re-en. Sec. 6851, R.C.M. 1921; Cal. Civ. C. Sec. 1068; Field Civ. C. Sec. 474; re-en. Sec. 6851, R.C.M. 1935; R.C.M. 1947, 67-1517.**

**70-1-516. Interpretation against grantor — exception.** A grant is to be interpreted in favor of the grantee, except that a reservation in any grant and every grant by a public officer or body, as such, to a private party is to be interpreted in favor of the grantor.

**History: En. Sec. 1473, Civ. C. 1895; re-en. Sec. 4605, Rev. C. 1907; re-en. Sec. 6852, R.C.M. 1921; Cal. Civ. C. Sec. 1069; Field Civ. C. Sec. 475; re-en. Sec. 6852, R.C.M. 1935; R.C.M. 1947, 67-1518.**

**70-1-517. Irreconcilable provisions.** If several parts of a grant are absolutely irreconcilable, the former part prevails.

**History: En. Sec. 1474, Civ. C. 1895; re-en. Sec. 4606, Rev. C. 1907; re-en. Sec. 6853, R.C.M. 1921; Cal. Civ. C. Sec. 1070; Field Civ. C. Sec. 476; re-en. Sec. 6853, R.C.M. 1935; R.C.M. 1947, 67-1519.**

**70-1-518. Meaning of heirs and issue in certain remainders.** Where a future interest is limited by a grant to take effect on the death of any person without heirs or heirs of his body or without issue or in equivalent words, such words must be taken to mean successors or issue living at the death of the person named as ancestor.

**History: En. Sec. 44, p. 486, Bannack Stat.; re-en. Sec. 44, p. 403, Cod. Stat. 1871; re-en. Sec. 221, 5th Div. Rev. Stat. 1879; re-en. Sec. 279, 5th Div. Comp. Stat. 1887; amd. Sec. 1475, Civ. C. 1895; re-en. Sec. 4607, Rev. C. 1907; re-en. Sec. 6854, R.C.M. 1921; Cal. Civ. C. Sec. 1071; Field Civ. C. Sec. 477; re-en. Sec. 6854, R.C.M. 1935; R.C.M. 1947, 67-1520.**

**70-1-519. Transfer vests title.** A transfer vests in the transferee all the actual title to the thing transferred which the transferor then has unless a different intention is expressed or is necessarily implied.

**History: En. Sec. 1490, Civ. C. 1895; re-en. Sec. 4609, Rev. C. 1907; re-en. Sec. 6856, R.C.M. 1921; Cal. Civ. C. Sec. 1083; Based on Field Civ. C. Sec. 479; re-en. Sec. 6856, R.C.M. 1935; R.C.M. 1947, 67-1522.**

**70-1-520. Transfer of incidents.** The transfer of a thing transfers also all its incidents unless expressly excepted, but the transfer of an incident to a thing does not transfer the thing itself.

**History: En. Sec. 1491, Civ. C. 1895; re-en. Sec. 4610, Rev. C. 1907; re-en. Sec. 6857, R.C.M. 1921; Cal. Civ. C. Sec. 1084; Field Civ. C. Sec. 481; re-en. Sec. 6857, R.C.M. 1935; R.C.M. 1947, 67-1523.**

**70-1-521. Grant may inure to benefit of stranger.** A present interest and the benefit of a condition or covenant respecting property may be taken by any natural person under a grant although not named a party thereto.

**History: En. Sec. 1492, Civ. C. 1895; re-en. Sec. 4611, Rev. C. 1907; re-en. Sec. 6858, R.C.M. 1921; Cal. Civ. C. Sec. 1805; Field Civ. C. Sec. 482; re-en. Sec. 6858, R.C.M. 1935; R.C.M. 1947, 67-1524.**

## Part 6

## Rentals — Hiring

**70-1-601. Hiring defined.** Hiring is a contract by which one gives to another the temporary possession and use of property, other than money, for reward, and the latter agrees to return the same to the former at a future time.

**History: En. Sec. 2600, Civ. C. 1895; re-en. Sec. 5215, Rev. C. 1907; re-en. Sec. 7730, R.C.M. 1921; Cal. Civ. C. Sec. 1925; Field Civ. C. Sec. 979; re-en. Sec. 7730, R.C.M. 1935; R.C.M. 1947, 42-101.**

**70-1-602. Quiet possession — letter obliged to secure.** An agreement to let upon hire binds the letter to secure to the hirer the quiet possession of the thing hired, during the term of the hiring, against all persons lawfully claiming the same.

**History: En. Sec. 2602, Civ. C. 1895; re-en. Sec. 5217, Rev. C. 1907; re-en. Sec. 7732, R.C.M. 1921; Cal. Civ. C. Sec. 1927; Field Civ. C. Sec. 981; re-en. Sec. 7732, R.C.M. 1935; R.C.M. 1947, 42-103.**

**70-1-603. Products of thing hired.** The products of a thing hired, during the hiring, belong to the hirer.

**History: En. Sec. 2601, Civ. C. 1895; re-en. Sec. 5216, Rev. C. 1907; re-en. Sec. 7731, R.C.M. 1921; Cal. Civ. C. Sec. 1926; Field Civ. C. Sec. 980; re-en. Sec. 7731, R.C.M. 1935; R.C.M. 1947, 42-102.**

**70-1-604. Standard of care required of hirer.** The hirer of a thing must use ordinary care for its preservation in safety and in good condition.

**History: En. Sec. 2603, Civ. C. 1895; re-en. Sec. 5218, Rev. C. 1907; re-en. Sec. 7733, R.C.M. 1921; Cal. Civ. C. Sec. 1928; Field Civ. C. Sec. 982; re-en. Sec. 7733, R.C.M. 1935; R.C.M. 1947, 42-104.**

**70-1-605. Hirer's duty to repair.** The hirer of a thing must repair all deteriorations or injuries thereto occasioned by his ordinary negligence.

**History: En. Sec. 2604, Civ. C. 1895; re-en. Sec. 5219, Rev. C. 1907; re-en. Sec. 7734, R.C.M. 1921; Cal. Civ. C. Sec. 1929; Field Civ. C. Sec. 983; re-en. Sec. 7734, R.C.M. 1935; R.C.M. 1947, 42-105.**

**70-1-606. Thing let for particular purpose.** When a thing is let for a particular purpose, the hirer must not use it for any other purpose, and if he does, the letter may hold him responsible for its safety during such use in all events or may treat the contract as thereby rescinded.

**History: En. Sec. 2605, Civ. C. 1895; re-en. Sec. 5220, Rev. C. 1907; re-en. Sec. 7735, R.C.M. 1921; Cal. Civ. C. Sec. 1930; Field Civ. C. Sec. 984; re-en. Sec. 7735, R.C.M. 1935; R.C.M. 1947, 42-106.**

**70-1-607. When hiring terminates.** The hiring of a thing terminates:

(1) at the end of the term agreed upon;
(2) by the mutual consent of the parties;
(3) by the hirer acquiring a title to the thing hired superior to that of the letter; or
(4) by the destruction of the thing hired.

**History: En. Sec. 2608, Civ. C. 1895; re-en. Sec. 5223, Rev. C. 1907; re-en. Sec. 7738, R.C.M. 1921; Cal. Civ. C. Sec. 1933; Field Civ. C. Sec. 987; re-en. Sec. 7738, R.C.M. 1935; R.C.M. 1947, 42-109.**

**70-1-608. Termination by death or incapacity.** If the hiring of a thing is terminable at the pleasure of one of the parties, it is terminated by notice to the other of his death or incapacity to contract. In other cases it is not terminated thereby.

**History: En. Sec. 2609, Civ. C. 1895; re-en. Sec. 5224, Rev. C. 1907; re-en. Sec. 7739, R.C.M. 1921; Cal. Civ. C. Sec. 1934; Field Civ. C. Sec. 988; re-en. Sec. 7739, R.C.M. 1935; R.C.M. 1947, 42-110.**

**70-1-609. When letter may terminate hiring.** The letter of a thing may terminate the hiring and reclaim the thing before the end of the term agreed upon when the hirer:

(1) uses or permits a use of the thing hired in a manner contrary to the agreement of the parties; or

(2) does not, within a reasonable time after request, make such repairs as he is bound to make.

**History: En. Sec. 2606, Civ. C. 1895; re-en. Sec. 5221, Rev. C. 1907; re-en. Sec. 7736, R.C.M. 1921; Cal. Civ. C. Sec. 1931; Field Civ. C. Sec. 985; re-en. Sec. 7736, R.C.M. 1935; R.C.M. 1947, 42-107.**

**70-1-610. When hirer may terminate hiring.** The hirer of a thing may terminate the hiring before the end of the term agreed upon when:

(1) the letter does not, within a reasonable time after request, fulfill his obligations, if any, as to placing and securing the hirer in the quiet possession of the thing hired or putting it into good condition or repairing; or

(2) the greater part of the thing hired or that part which was and which the letter had at the time of the hiring reason to believe was the material inducement to the hirer to enter into the contract perishes from any other cause than the ordinary negligence of the hirer.

**History: En. Sec. 2607, Civ. C. 1895; re-en. Sec. 5222, Rev. C. 1907; re-en. Sec. 7737, R.C.M. 1921; Cal. Civ. C. Sec. 1932; Field Civ. C. Sec. 986; re-en. Sec. 7737, R.C.M. 1935; R.C.M. 1947, 42-108.**

**70-1-611. Apportionment of rent upon termination.** When the hiring of a thing is terminated before the time originally agreed upon, the hirer must pay the due proportion of the hire for such use as he has actually made of the thing unless such use is merely nominal and of no benefit to him.

**History: En. Sec. 2610, Civ. C. 1895; re-en. Sec. 5225, Rev. C. 1907; re-en. Sec. 7740, R.C.M. 1921; Cal. Civ. C. Sec. 1935; Field Civ. C. Sec. 989; re-en. Sec. 7740, R.C.M. 1935; R.C.M. 1947, 42-111.**

# CHAPTER 2

## PERSONAL PROPERTY — SPECIAL KINDS QUIET TITLE AND PARTITION

### Part 1 — Special Kinds

Section
70-2-101. Thing in action defined.
70-2-102. Transfer and succession.
Sections 70-2-103 through 70-2-110 reserved.
70-2-111. Wild animals.
70-2-112. Property rights in fur-bearing animals.
70-2-113. Fur-bearing animals — recording of brands — fees.

### Part 2 — Quiet Title and Partition

70-2-201. Action for quieting title to personal property.
70-2-202. General procedural provisions applicable.
Sections 70-2-203 through 70-2-210 reserved.
70-2-211. Partition of personal property.
70-2-212. Real property partition provisions applicable.

## Part 1

## Special Kinds

**70-2-101. Thing in action defined.** A thing in action is a right to recover money or other personal property by a judicial proceeding.

**History: En. Sec. 1350, Civ. C. 1895; re-en. Sec. 4557, Rev. C. 1907; re-en. Sec. 6804, R.C.M. 1921; Cal. Civ. C. Sec. 953; Based on Field Civ. C. Sec. 366; re-en. Sec. 6804, R.C.M. 1935; R.C.M. 1947, 67-1102.**

**70-2-102. Transfer and succession.** A thing in action arising out of the violation of a right of property or out of an obligation may be transferred by the owner. Upon the death of the owner, it passes to his personal representatives except where in the cases provided in this code it passes to his devisees or successor in office.

**History: En. Sec. 1351, Civ. C. 1895; re-en. Sec. 4558, Rev. C. 1907; re-en. Sec. 6805, R.C.M. 1921; Cal. Civ. C. Sec. 954; Field Civ. C. Sec. 367; re-en. Sec. 6805, R.C.M. 1935; R.C.M. 1947, 67-1103.**

**70-2-103 through 70-2-110 reserved.**

**70-2-111. Wild animals.** Animals wild by nature are the subjects of ownership, while living, only when on the land of the person claiming them or when tamed or taken or held in the possession or disabled and immediately pursued.

**History: En. Sec. 1072, Civ. C. 1895; re-en. Sec. 4423, Rev. C. 1907; re-en. Sec. 6665, R.C.M. 1921; Cal. Civ. C. Sec. 656; Field Civ. C. Sec. 161; re-en. Sec. 6665, R.C.M. 1935; R.C.M. 1947, 67-203.**

**70-2-112. Property rights in fur-bearing animals.** Fur-bearing animals, which of their nature, in the absence of efforts for their domestication, are known as wild, whenever the same shall have been brought into or born in restraint or captivity, whether in or upon reserves, preserves, parks, ranches, or other premises of lands or waters possessed or operated in whole or part for the preservation, culture, breeding, or growing of such animals in a state of whole or partial domestication and wherein or whereon routine attention is given to such preservation, culture, breeding, or growing of such animals, are and shall be, together with their offspring and increase, the subjects of ownership, lien, and all kinds of absolute and other property rights (the same as purely domestic animals) in whatever situation, location, or condition such animals may thereafter come or be and regardless of their remaining in or escaping from such restraint or captivity. However, such escaped animals must bear a registered brand or tattoo, pursuant to 70-2-113, to be subject to private ownership.

**History: En. Sec. 1, Ch. 97, L. 1933; re-en. Sec. 6665.1, R.C.M. 1935; R.C.M. 1947, 67-204.**

**70-2-113. Fur-bearing animals — recording of brands — fees.** (1) An owner or prospective owner of animals described in 70-2-112 is entitled by written subscribed statement to adopt distinctive brands or tattoo marks, not including arabic numerals and not already in known use by others, for any of the animals and to have the distinctive brands and tattoo marks recorded in his name with the department of livestock on paying a recording fee equal to that charged for recording marks or brands used on domestic animals and livestock set by 81-3-107 for each brand and for each tattoo mark. The statements shall be recorded in a suitable book to be kept for that purpose by the department of livestock. The presence of the recorded brand or recorded tattoo marks on an animal is prima facie evidence of the ownership of the animal in the person, association, or corporation in whose name the brand or tattoo mark is recorded, subject always to the right to make a transfer of title, right, or interest in or lien on the animal.

(2) A person desiring to transfer a brand or mark properly recorded by him under this section may do so provided he meets the requirements and pays the fees imposed by Title 81, chapter 3, part 1. Brands or marks recorded under this section are subject to the same rerecording requirements and fees as imposed by Title 81, chapter 3, part 1.

(3) All fees collected under this section shall be paid into the earmarked revenue fund for the use of the department.

**History: En. Sec. 2, Ch. 97, L. 1933; re-en. Sec. 6665.2, R.C.M. 1935; amd. Sec. 196, Ch. 310, L. 1974; amd. Sec. 2, Ch. 10, L. 1977; R.C.M. 1947, 67-205.**

## Part 2

## Quiet Title and Partition

**70-2-201. Action for quieting title to personal property.** Any person claiming title to personal property, whether in actual possession thereof or not, may bring an action in the district court of any county wherein such personal property or any part thereof is situated against any person or persons claiming any interest therein by reason of alleged ownership, lien, or otherwise and by a decree of such court may have established and determined finally the rights of all claimants to such personal property.

**History: En. Sec. 1, Ch. 51, L. 1935; re-en. Sec. 9478.1, R.C.M. 1935; R.C.M. 1947, 93-6201.**

**70-2-202. General procedural provisions applicable.** The provisions of [93-3001 to 93-3020, inclusive,] and Rules 4, 12(a), and 41(e), M.R.Civ.P., are hereby made applicable to the action for which provision is made in 70-2-201.

**History: En. Sec. 2, Ch. 51, L. 1935; re-en. Sec. 9478.2, R.C.M. 1935; R.C.M. 1947, 93-6202.**

**70-2-203 through 70-2-210 reserved.**

**70-2-211. Partition of personal property.** (1) When any personal property is owned by two or more persons, any one or more thereof may bring an action, according to the respective rights of the persons interested therein, for the partition of such property or for a sale of the same or any part thereof if it appears that a partition cannot be made without great prejudice to the owners.

(2) Such action shall be brought in the county wherein said property or any part thereof is situated.

**History: En. Sec. 1, Ch. 143, L. 1959; R.C.M. 1947, 93-6301.1.**

**70-2-212. Real property partition provisions applicable.** The provisions contained in chapter 29 of this title, which prescribe the manner in which real property may be sold, are hereby made applicable to the action which is authorized by 70-2-211.

**History: En. Sec. 2, Ch. 143, L. 1959; R.C.M. 1947, 93-6301.2.**

# CHAPTER 3

# TRANSFER OF PERSONAL PROPERTY — GIFTS

**Part 1 — General Provisions**

Section

70-3-101. Gift defined.
70-3-102. Gift — how made.
70-3-103. Gift not revocable.
70-3-104. Unsolicited goods considered gift.

**Part 2 — Gifts in View of Death**

70-3-201. Gift in view of death defined.
70-3-202. When gift presumed to be in view of death.
70-3-203. Revocation.
70-3-204. Effect of will upon gift.
70-3-205. When gift treated as legacy.

## Part 1

## General Provisions

**70-3-101. Gift defined.** A gift is a transfer of personal property made voluntarily and without consideration.

**History: En. Sec. 1550, Civ. C. 1895; re-en. Sec. 4635, Rev. C. 1907; re-en. Sec. 6882, R.C.M. 1921; Cal. Civ. C. Sec. 1146; Field Civ. C. Sec. 500; re-en. Sec. 6882, R.C.M. 1935; R.C.M. 1947, 67-1706.**

**70-3-102. Gift — how made.** A verbal gift is not valid unless the means of obtaining possession and control of the thing are given or, if it is capable of delivery, unless there is an actual or symbolical delivery of the thing to the donee.

**History: En. Sec. 1551, Civ. C. 1895; re-en. Sec. 4636, Rev. C. 1907; re-en. Sec. 6883, R.C.M. 1921; Cal. Civ. C. Sec. 1147; Field Civ. C. Sec. 501; re-en. Sec. 6883, R.C.M. 1935; R.C.M. 1947, 67-1707.**

**70-3-103. Gift not revocable.** A gift, other than a gift in view of death, cannot be revoked by the giver.

**History: En. Sec. 1552, Civ. C. 1895; re-en. Sec. 4637, Rev. C. 1907; re-en. Sec. 6884, R.C.M. 1921; Cal. Civ. C. Sec. 1148; Field Civ. C. Sec. 502; re-en. Sec. 6884, R.C.M. 1935; R.C.M. 1947, 67-1708.**

**70-3-104. Unsolicited goods considered gift.** Unless otherwise agreed, where unsolicited goods are delivered to a person, he may refuse delivery of the goods, or if the goods are delivered, the person is not bound to return the goods to the sender. If unsolicited goods are either addressed to or intended for the recipient, they shall be deemed a gift, and the recipient may use or dispose of them in any manner without obligation to the sender.

**History: En. Sec. 1, Ch. 210, L. 1967; R.C.M. 1947, 67-1706.1.**

## Part 2

## Gifts in View of Death

**70-3-201. Gift in view of death defined.** A gift in view of death is one which is made in contemplation, fear, or peril of death and with intent that it shall take effect only in case of the death of the giver.

**History: En. Sec. 1553, Civ. C. 1895; re-en. Sec. 4638, Rev. C. 1907; re-en. Sec. 6885, R.C.M. 1921; Cal. Civ. C. Sec. 1149; Field Civ. C. Sec. 503; re-en. Sec. 6885, R.C.M. 1935; R.C.M. 1947, 67-1709.**

**70-3-202. When gift presumed to be in view of death.** A gift made during the last illness of the giver or under circumstances which would impress him with an expectation of speedy death is presumed to be a gift in view of death.

**History: En. Sec. 1554, Civ. C. 1895; re-en. Sec. 4639, Rev. C. 1907; re-en. Sec. 6886, R.C.M. 1921; Cal. Civ. C. Sec. 1150; Field Civ. C. Sec. 504; re-en. Sec. 6886, R.C.M. 1935; R.C.M. 1947, 67-1710.**

**70-3-203. Revocation.** A gift in view of death may be revoked by the giver at any time and is revoked by his recovery from the illness or escape from the peril under the presence of which it was made or by the occurrence of any event which would operate as a revocation of a will made at the same time.

**History: En. Sec. 1555, Civ. C. 1895; re-en. Sec. 4640, Rev. C. 1907; re-en. Sec. 6887, R.C.M. 1921; Cal. Civ. C. Sec. 1151; Field Civ. C. Sec. 505; re-en. Sec. 6887, R.C.M. 1935; R.C.M. 1947, 67-1711.**

**70-3-204. Effect of will upon gift.** A gift in view of death is not affected by a previous will or by a subsequent will unless it expresses intention to revoke the gift.

**History: En. Sec. 1556, Civ. C. 1895; re-en. Sec. 4641, Rev. C. 1907; re-en. Sec. 6888, R.C.M. 1921; Cal. Civ. C. Sec. 1152; Field Civ. C. Sec. 506; re-en. Sec. 6888, R.C.M. 1935; R.C.M. 1947, 67-1712.**

**70-3-205. When gift treated as legacy.** A gift in view of death must be treated as a legacy so far as relates to the creditors of the giver.

**History: En. Sec. 1557, Civ. C. 1895; re-en. Sec. 4642, Rev. C. 1907; re-en. Sec. 6889, R.C.M. 1921; Cal. Civ. C. Sec. 1153; Field Civ. C. Sec. 507; re-en. Sec. 6889, R.C.M. 1935; R.C.M. 1947, 67-1713.**

# CHAPTER 4

# ACCESSION AND INTERMIXTURE PERSONAL PROPERTY

### Part 1 — General Provisions

Section
70-4-101. Uniform Commercial Code — applicability.
70-4-102. Uniting several things — to whom whole belongs.
70-4-103. Rules for determination of principal part.

### Part 2 — Uniting of Materials—Workmanship

70-4-201. Use of materials belonging to another — reimbursement.

70-4-202. Uniting of materials of maker and other.
70-4-203. Uniting of materials of several owners.
70-4-204. Use of materials without consent — owner prevails.
70-4-205. Owner of materials wrongfully used — election of remedies.
70-4-206. Wrongdoer liable in damages.

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## Part 1

## General Provisions

**70-4-101. Uniform Commercial Code — applicability.** The provisions of this chapter apply only to the extent not otherwise provided for in the Uniform Commercial Code.

**History: En. 67-1410 by Sec. 11-147, Ch. 264, L. 1963; R.C.M. 1947, 67-1410.**

**70-4-102. Uniting several things — to whom whole belongs.** When things belonging to different owners have been united so as to form a single thing and cannot be separated without injury, the whole belongs to the owner of the thing which forms the principal part, who must, however, reimburse the value of the residue to the other owner or surrender the whole to him.

**History: En. Sec. 1410, Civ. C. 1895; re-en. Sec. 4579, Rev. C. 1907; re-en. Sec. 6826, R.C.M. 1921; Cal. Civ. C. Sec. 1025; Field Civ. C. Sec. 449; re-en. Sec. 6826, R.C.M. 1935; R.C.M. 1947, 67-1401.**

**70-4-103. Rules for determination of principal part.** (1) That part is deemed to be the principal to which the other has been united only for the use, ornament, or completion of the former unless the latter is the more valuable and has been united without the knowledge of its owner, who may, in the latter case, require it to be separated and returned to him although some injury should result to the thing to which it has been united.

(2) If neither part can be considered the principal within the rule prescribed by subsection (1), the more valuable or, if the values are nearly equal, the most considerable in bulk is to be deemed the principal part.

**History: En. Secs. 1411, 1412, Civ. C. 1895; re-en. Secs. 4580, 4581, Rev. C. 1907; re-en. Secs. 6827, 6828, R.C.M. 1921; Cal. Civ. C. Secs. 1026, 1027; Field Civ. C. Secs. 450, 451; re-en. Secs. 6827, 6828, R.C.M. 1935; R.C.M. 1947, 67-1402, 67-1403.**

## Part 2

## Uniting of Materials — Workmanship

**70-4-201. Use of materials belonging to another — reimbursement.** If one makes a thing from materials belonging to another, the latter may claim the thing on reimbursing the value of the workmanship unless the value of the workmanship exceeds the value of the materials, in which case the thing belongs to the maker on reimbursing the value of the materials.

**History: En. Sec. 1413, Civ. C. 1895; re-en. Sec. 4582, Rev. C. 1907; re-en. Sec. 6829, R.C.M. 1921; Cal. Civ. C. Sec. 1028; Field Civ. C. Sec. 452; re-en. Sec. 6829, R.C.M. 1935; R.C.M. 1947, 67-1404.**

**70-4-202. Uniting of materials of maker and other.** Where one has made use of materials which in part belong to him and in part to another in order to form a thing of a new description, without having destroyed any of the materials but in such a way that they cannot be separated without inconvenience, the thing formed is common to both proprietors in proportion, as respects the one, of the materials belonging to him and, as respects the other, of the materials belonging to him and the price of his workmanship.

**History: En. Sec. 1414, Civ. C. 1895; re-en. Sec. 4583, Rev. C. 1907; re-en. Sec. 6830, R.C.M. 1921; Cal. Civ. C. Sec. 1029; Field Civ. C. Sec. 453; re-en. Sec. 6830, R.C.M. 1935; R.C.M. 1947, 67-1405.**

**70-4-203. Uniting of materials of several owners.** When a thing has been formed by the admixture of several materials of different owners and neither can be considered the principal substance, an owner without whose consent the admixture was made may require a separation if the materials can be separated without inconvenience. If they cannot be thus separated, the owners acquire the thing in common, in proportion to the quantity, quality, and value of their materials, but if the materials of one were far superior to those of the others, both in quantity and value, he may claim the thing on reimbursing to the others the value of their materials.

**History: En. Sec. 1415, Civ. C. 1895; re-en. Sec. 4584, Rev. C. 1907; re-en. Sec. 6831, R.C.M. 1921; Cal. Civ. C. Sec. 1030; Field Civ. C. Sec. 454; re-en. Sec. 6831, R.C.M. 1935; R.C.M. 1947, 67-1406.**

**70-4-204. Use of materials without consent — owner prevails.** The foregoing sections of this chapter are not applicable to cases in which one willfully uses the materials of another without his consent, but in such cases, the product belongs to the owner of material if its identity can be traced.

**History: En. Sec. 1416, Civ. C. 1895; re-en. Sec. 4585, Rev. C. 1907; re-en. Sec. 6832, R.C.M. 1921; Cal. Civ. C. Sec. 1031; Field Civ. C. Sec. 455; re-en. Sec. 6832, R.C.M. 1935; R.C.M. 1947, 67-1407.**

**70-4-205. Owner of materials wrongfully used — election of remedies.** In all cases where one whose material has been used without his knowledge in order to form a product of a different description can claim an interest in such product, he has an option to demand either restitution of his material in kind, in the same quantity, weight, measure, and quality, or the value thereof or, where he is entitled to the product, the value thereof in place of the product.

**History: En. Sec. 1417, Civ. C. 1895; re-en. Sec. 4586, Rev. C. 1907; re-en. Sec. 6833, R.C.M. 1921; Cal. Civ. C. Sec. 1032; Field Civ. C. Sec. 456; re-en. Sec. 6833, R.C.M. 1935; R.C.M. 1947, 67-1408.**

**70-4-206. Wrongdoer liable in damages.** One who wrongfully employs materials belonging to another is liable to him in damages as well as under the foregoing provisions of this chapter.

**History: En. Sec. 1418, Civ. C. 1895; re-en. Sec. 4587, Rev. C. 1907; re-en. Sec. 6834, R.C.M. 1921; Cal. Civ. C. Sec. 1033; Field Civ. C. Sec. 457; re-en. Sec. 6834, R.C.M. 1935; R.C.M. 1947, 67-1409.**

# CHAPTER 5

## FINDERS

### Part 1 — Rights and Duties of Finders Generally

Section
70-5-101. Nonapplicability to things abandoned.
70-5-102. Finder not bound to take charge — status as depositary.

70-5-103. Duty to inform owner when known.
70-5-104. Right of finder to require proof of claimant's ownership.
70-5-105. Compensation of finder.
70-5-106. Exoneration of finder by storage of thing found.
70-5-107. Exoneration of owner by surrender of thing to finder.

**Part 2 — Procedure**

70-5-201. When finder may sell thing found.
70-5-202. How sale conducted.
70-5-203. Finder to make affidavit when owner not known.
70-5-204. Justice to appoint appraisers — duty of appraisers.
70-5-205. Recording and posting of valuation and description.
70-5-206. When property vests in finder — publication.
70-5-207. When finder to restore property.
70-5-208. Proof — how made.
70-5-209. Finder failing to make discovery — double recovery.

## Part 1

## Rights and Duties of Finders Generally

**70-5-101. Nonapplicability to things abandoned.** The provisions of this chapter have no application to things which have been intentionally abandoned by their owners.

**History: En. Sec. 2528, Civ. C. 1895; re-en. Sec. 5186, Rev. C. 1907; re-en. Sec. 7693, R.C.M. 1921; Cal. Civ. C. Sec. 1872; Field Civ. C. Sec. 946; re-en. Sec. 7693, R.C.M. 1935; R.C.M. 1947, 20-409.**

**70-5-102. Finder not bound to take charge — status as depositary.** One who finds a thing lost is not bound to take charge of it, but if he does so, he is thenceforth a depositary for the owner, with the rights and obligations of a depositary for hire.

**History: En. Sec. 2520, Civ. C. 1895; re-en. Sec. 5178, Rev. C. 1907; re-en. Sec. 7685, R.C.M. 1921; Cal. Civ. C. Sec. 1864; Field Civ. C. Sec. 938; re-en. Sec. 7685, R.C.M. 1935; R.C.M. 1947, 20-401.**

**70-5-103. Duty to inform owner when known.** (1) If the finder of a thing knows or suspects who is the owner, he must, with reasonable diligence, give him notice of the finding, and if he fails to do so, he is liable in damages to the owner and has no claim to any reward offered by him for the recovery of the thing or to any compensation for his trouble or expenses.

(2) If any person find any money, goods, things in action, or other personal property or save any domestic animal from drowning or from starvation when such property is of the value of $10 or more, he must inform the owner thereof, if known, and make restitution without compensation, further than a reasonable charge for saving and taking care thereof.

**History: (1)En. Sec. 2521, Civ. C. 1895; re-en. Sec. 5179, Rev. C. 1907; re-en. Sec. 7686, R.C.M. 1921; Cal. Civ. C. Sec. 1865; Field Civ. C. Sec. 939; re-en. Sec. 7686, R.C.M. 1935; Sec. 20-402, R.C.M. 1947; (2)En. Sec. 2900, Pol. C. 1895; re-en. Sec. 1996, Rev. C. 1907; re-en. Sec. 7694, R.C.M. 1921; Cal. Pol. C. Sec. 3136; re-en. Sec. 7694, R.C.M. 1935; Sec. 20-410, R.C.M. 1947; R.C.M. 1947, 20-402, 20-410(part).**

**70-5-104. Right of finder to require proof of claimant's ownership.** The finder of a thing may in good faith before giving it up require reasonable proof of ownership from any person claiming it.

**History: En. Sec. 2522, Civ. C. 1895; re-en. Sec. 5180, Rev. C. 1907; re-en. Sec. 7687, R.C.M. 1921; Cal. Civ. C. Sec. 1866; Field Civ. C. Sec. 940; re-en. Sec. 7687, R.C.M. 1935; R.C.M. 1947, 20-403.**

**70-5-105. Compensation of finder.** The finder of a thing is entitled to compensation for all expenses necessarily incurred by him in its preservation and for any other service necessarily performed by him about it and to a reasonable reward for keeping it.

**History: En. Sec. 2523, Civ. C. 1895; re-en. Sec. 5181, Rev. C. 1907; re-en. Sec. 7688, R.C.M. 1921; Cal. Civ. Sec. 1867; Field. Civ. C. Sec. 941; re-en. Sec. 7688, R.C.M. 1935; R.C.M. 1947, 20-404.**

**70-5-106. Exoneration of finder by storage of thing found.** The finder of a thing may exonerate himself from liability at any time by placing it on storage with any responsible person of good character at a reasonable expense.

**History: En. Sec. 2524, Civ. C. 1895; re-en. Sec. 5182, Rev. C. 1907; re-en. Sec. 7689, R.C.M. 1921; Cal. Civ. C. Sec. 1868; Field Civ. C. Sec. 942; re-en. Sec. 7689, R.C.M. 1935; R.C.M. 1947, 20-405.**

**70-5-107. Exoneration of owner by surrender of thing to finder.** The owner of a thing found may exonerate himself from the claims of the finder by surrendering it to him in satisfaction thereof.

**History: En. Sec. 2527, Civ. C. 1895; re-en. Sec. 5185, Rev. C. 1907; re-en. Sec. 7692, R.C.M. 1921; Cal. Civ. C. Sec. 1868; Field. Civ. C. Sec. 945; re-en. Sec. 7692, R.C.M. 1935; R.C.M. 1947, 20-408.**

## Part 2

## Procedure

**70-5-201. When finder may sell thing found.** The finder of a thing may sell it, if it is a thing which is commonly the subject of sale, when the owner cannot with reasonable diligence be found or being found refuses upon demand to pay the lawful charges of the finder, in the following cases:

(1) when the thing is in danger of perishing or of losing the greater part of its value; or

(2) when the lawful charges of the finder amount to two-thirds of its value.

**History: En. Sec. 2525, Civ. C. 1895; re-en. Sec. 5183, Rev. C. 1907; re-en. Sec. 7690, R.C.M. 1921; Cal. Civ. C. Sec. 1869; Field Civ. C. Sec. 943; re-en. Sec. 7690, R.C.M. 1935; R.C.M. 1947, 20-406.**

**70-5-202. How sale conducted.** A sale under the provisions of 70-5-201 must be made in the same manner as the sale of a thing pledged.

**History: En. Sec. 2526, Civ. C. 1895; re-en. Sec. 5184, Rev. C. 1907; re-en. Sec. 7691, R.C.M. 1921; Cal. Civ. C. Sec. 1870; Field Civ. C. Sec. 944; re-en. Sec. 7691, R.C.M. 1935; R.C.M. 1947, 20-407.**

**70-5-203. Finder to make affidavit when owner not known.** If the owner is not known to the party saving or finding such property, he must, within 5 days, make an affidavit before some justice of the peace of the county stating when and where he found or saved such property, particularly describing it and, if the property was saved, particularly from what and how he saved the same, stating therein whether the owner of the property is known to him and that he has not secreted, withheld, or disposed of any part of such property.

**History: En. Sec. 2900, Pol. C. 1895; re-en. Sec. 1996, Rev. C. 1907; re-en. Sec. 7694, R.C.M. 1921; Cal. Pol. C. Sec. 3136; re-en. Sec. 7694, R.C.M. 1935; R.C.M. 1947, 20-410(part).**

**70-5-204. Justice to appoint appraisers — duty of appraisers.** The justice must then summon three disinterested householders to appraise the same. The appraisers or any two of them must make two lists of the valuation and description of such property and sign and make oath to the same and deliver one of the lists to the finder and the other to the justice of the peace.

**History: En. Sec. 2901, Pol. C. 1895; re-en. Sec. 1997, Rev. C. 1907; re-en. Sec. 7695, R.C.M. 1921; Cal. Pol. C. Sec. 3137; re-en. Sec. 7695, R.C.M. 1935; R.C.M. 1947, 20-411.**

**70-5-205. Recording and posting of valuation and description.** The justice must file such list, and the finder must transmit a copy of the same to the county clerk and recorder, who must record the same in a book known as the "Estray and Lost Property Book" within 15 days, and the finder must at once set up at the courthouse door and four other public places in the township or city a copy of such valuation and a description of property.

**History: En. Sec. 2902, Pol. C. 1895; re-en. Sec. 1998, Rev. C. 1907; re-en. Sec. 7696, R.C.M. 1921; Cal. Pol. C. Sec. 3138; re-en. Sec. 7696, R.C.M. 1935; R.C.M. 1947, 20-412.**

**70-5-206. When property vests in finder — publication.** If no owner appears and proves the property within 6 months and the value thereof does not exceed $20, the same vests in the finder; but if the value exceeds $20, the finder must, within 30 days after setting up the list mentioned in 70-5-205, cause a copy of the description to be inserted in some newspaper printed in the county if there be one and if not, in some newspaper printed in the state for 3 weeks. If no owner prove the property within 1 year after such publication, it vests in the finder.

**History: En. Sec. 2903, Pol. C. 1895; re-en. Sec. 1999, Rev. C. 1907; re-en. Sec. 7697, R.C.M. 1921; Cal. Pol. C. Sec. 3139; re-en. Sec. 7697, R.C.M. 1935; R.C.M. 1947, 20-413.**

**70-5-207. When finder to restore property.** If within 1 year an owner appears and proves the property and pays all reasonable charges, including fees of officers, the finder must restore the same to him. On failure to make restoration of such property or the appraised value thereof, on being tendered such charges and fees, the owner may recover the same or the value thereof by civil action in any court having jurisdiction.

**History: En. Sec. 2904, Pol. C. 1895; re-en. Sec. 2000, Rev. C. 1907; re-en. Sec. 7698, R.C.M. 1921; Cal. Pol. C. Sec. 3140; re-en. Sec. 7698, R.C.M. 1935; R.C.M. 1947, 20-414.**

**70-5-208. Proof — how made.** The proof required by this chapter must be made before the county clerk and recorder with whom the list provided for herein is filed, and if he is satisfied therefrom that the person claiming to be is the owner, he must certify that fact under his hand and seal.

**History: En. Sec. 2906, Pol. C. 1895; re-en. Sec. 2002, Rev. C. 1907; re-en. Sec. 7700, R.C.M. 1921; Cal. Pol. C. Sec. 3142; re-en. Sec. 7700, R.C.M. 1935; R.C.M. 1947, 20-416.**

**70-5-209. Finder failing to make discovery — double recovery.** If any person find any money, property, or other valuable thing and fail to make discovery of the same as required by this chapter, he forfeits to the owner double the value thereof.

**History: En. Sec. 2905, Pol. C. 1895; re-en. Sec. 2001, Rev. C. 1907; re-en. Sec. 7699, R.C.M. 1921; Cal. Pol. C. Sec. 3141; re-en. Sec. 7699, R.C.M. 1935; R.C.M. 1947, 20-415.**

# CHAPTER 6

## BAILMENT — DEPOSIT

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## Part 1

## Nature and Classification of Deposits

**70-6-101. Deposit — voluntary or involuntary.** A deposit may be:
(1) voluntary or involuntary; and
(2) for safekeeping or for exchange.

**History: En. Sec. 2440, Civ. C. 1895; re-en. Sec. 5133, Rev. C. 1907; re-en. Sec. 7636, R.C.M. 1921; Cal. Civ. C. Sec. 1813; Field Civ. C. Sec. 907; re-en. Sec. 7636, R.C.M. 1935; R.C.M. 1947, 20-101.**

**70-6-102. Voluntary deposit — how made.** A voluntary deposit is made by one giving to another, with his consent, the possession of personal property to keep for the benefit of the former or of a third party. The person giving is called the depositor and the person receiving the depositary.

**History: En. Sec. 2441, Civ. C. 1895; re-en. Sec. 5134, Rev. C. 1907; re-en. Sec. 7637, R.C.M. 1921; Cal. Civ. C. Sec. 1814; Field Civ. C. Sec. 908; re-en. Sec. 7637, R.C.M. 1935; R.C.M. 1947, 20-102.**

**70-6-103. Involuntary deposit — how made.** An involuntary deposit is made:

(1) by the accidental leaving or placing of personal property in the possession of any person, without negligence on the part of the owner; or

(2) in cases of fire, shipwreck, inundation, insurrection, riot, or like extraordinary emergencies, by the owner of personal property committing it out of necessity to the care of any person.

**History: En. Sec. 2442, Civ. C. 1895; re-en. Sec. 5135, Rev. C. 1907; re-en. Sec. 7638, R.C.M. 1921; Cal. Civ. C. Sec. 1815; Field Civ. C. Sec. 909; re-en. Sec. 7638, R.C.M. 1935; R.C.M. 1947, 20-103.**

**70-6-104. Involuntary depositary bound to take charge.** The person with whom a thing is deposited in the manner described in 70-6-103 is bound to take charge of it if able to do so.

**History: En. Sec. 2443, Civ. C. 1895; re-en. Sec. 5136, Rev. C. 1907; re-en. Sec. 7639, R.C.M. 1921; Cal. Civ. C. Sec. 1816; Field Civ. C. Sec. 910; re-en. Sec. 7639, R.C.M. 1935; R.C.M. 1947, 20-104.**

**70-6-105. Involuntary deposit as gratuitous.** An involuntary deposit is gratuitous, the depositary being entitled to no reward.

**History: En. Sec. 2481, Civ. C. 1895; re-en. Sec. 5154, Rev. C. 1907; re-en. Sec. 7657, R.C.M. 1921; Cal. Civ. C. Sec. 1845; Field Civ. C. Sec. 928; re-en. Sec. 7657, R.C.M. 1935; R.C.M. 1947, 20-210.**

**70-6-106. Deposit for keeping defined.** A deposit for keeping is one in which the depositary is bound to return the identical thing deposited.

**History: En. Sec. 2444, Civ. C. 1895; re-en. Sec. 5137, Rev. C. 1907; re-en. Sec. 7640, R.C.M. 1921; Cal. Civ. C. Sec. 1817; Field Civ. C. Sec. 911; re-en. Sec. 7640, R.C.M. 1935; R.C.M. 1947, 20-105.**

**70-6-107. Deposit for exchange defined.** A deposit for exchange is one in which the depositary is only bound to return a thing corresponding in kind to that which is deposited.

**History: En. Sec. 2445, Civ. C. 1895; re-en. Sec. 5138, Rev. C. 1907; re-en. Sec. 7641, R.C.M. 1921; Cal. Civ. C. Sec. 1818; Field Civ. C. Sec. 912; re-en. Sec. 7641, R.C.M. 1935; R.C.M. 1947, 20-106.**

**70-6-108. Deposit for exchange — title passes.** A deposit for exchange transfers to the depositary the title to the thing deposited and creates between him and the depositor the relation of debtor and creditor merely.

**History: En. Sec. 2540, Civ. C. 1895; re-en. Sec. 5187, Rev. C. 1907; re-en. Sec. 7701, R.C.M. 1921; Cal. Civ. C. Sec. 1878; Field Civ. C. Sec. 947; re-en. Sec. 7701, R.C.M. 1935; R.C.M. 1947, 20-501.**

## Part 2

## Rights and Duties of the Parties Generally

**70-6-201. Depositary not to use or open thing deposited.** A depositary may not use the thing deposited or permit it to be used for any purpose without the consent of the depositor. He may not, if it is purposely fastened by the depositor, open it without the consent of the latter, except in case of necessity.

**History: En. Sec. 2462, Civ. C. 1895; re-en. Sec. 5147, Rev. C. 1907; re-en. Sec. 7650, R.C.M. 1921; Cal. Civ. C. Sec. 1835; Field Civ. C. Sec. 921; re-en. Sec. 7650, R.C.M. 1935; R.C.M. 1947, 20-203.**

**70-6-202. Liability for damage from wrongful use.** A depositary is liable for any damage happening to the thing deposited during his wrongful use thereof unless such damage must inevitably have happened though the property had not been used.

**History: En. Sec. 2463, Civ. C. 1895; re-en. Sec. 5148, Rev. C. 1907; re-en. Sec. 7651, R.C.M. 1921; Cal. Civ. C. Sec. 1836; Field Civ. C. Sec. 922; re-en. Sec. 7651, R.C.M. 1935; R.C.M. 1947, 20-204.**

**70-6-203. Loss or injury of thing deposited.** If a thing is lost during its deposit and the depositary refuses to inform the depositor of the circumstances under which the loss or injury occurred so far as he has information concerning them or willfully misrepresents the circumstances to him, the depositary is presumed to have willfully or by gross negligence permitted the loss or injury to occur.

**History: En. Sec. 2465, Civ. C. 1895; re-en. Sec. 5150, Rev. C. 1907; re-en. Sec. 7653, R.C.M. 1921; Cal. Civ. C. Sec. 1838; Based on Field Civ. C. Sec. 924; re-en. Sec. 7653, R.C.M. 1935; R.C.M. 1947, 20-206.**

**70-6-204. Extent of depositary's liability for negligence.** The liability of a depositary for negligence cannot exceed the amount which he is informed by the depositor or has reason to suppose the thing deposited to be worth.

**History: En. Sec. 2467, Civ. C. 1895; re-en. Sec. 5152, Rev. C. 1907; re-en. Sec. 7655, R.C.M. 1921; Cal. Civ. C. Sec. 1840; Based on Field Civ. C. Sec. 926; re-en. Sec. 7655, R.C.M. 1935; R.C.M. 1947, 20-208.**

**70-6-205. Sale of thing in danger of perishing.** If a thing deposited is in actual danger of perishing before instructions can be obtained from the depositor, the depositary may sell it for the best price obtainable and retain the proceeds as a deposit, giving immediate notice of his proceedings to the depositor.

**History: En. Sec. 2464, Civ. C. 1895; re-en. Sec. 5149, Rev. C. 1907; re-en. Sec. 7652, R.C.M. 1921; Cal. Civ. C. Sec. 1837; Field Civ. C. Sec. 923; re-en. Sec. 7652, R.C.M. 1935; R.C.M. 1947, 20-205.**

**70-6-206. Duty of depositary of animals.** A depositary of living animals must provide them with suitable food and shelter and treat them kindly.

**History: En. Sec. 2461, Civ. C. 1895; re-en. Sec. 5146, Rev. C. 1907; re-en. Sec. 7649, R.C.M. 1921; Cal. Civ. C. Sec. 1834; Field Civ. C. Sec. 920; re-en. Sec. 7649, R.C.M. 1935; R.C.M. 1947, 20-202.**

**70-6-207. Service rendered by depositary.** So far as any service is rendered by a depositary or required from him, his duties and liabilities are prescribed by the law on employment and service.

**History: En. Sec. 2466, Civ. C. 1895; re-en. Sec. 5151, Rev. C. 1907; re-en. Sec. 7654, R.C.M. 1921; Cal. Civ. C. Sec. 1839; Field Civ. C. Sec. 925; re-en. Sec. 7654, R.C.M. 1935; R.C.M. 1947, 20-207.**

**70-6-208. Notice to owner of adverse claim.** A depositary must give prompt notice to the person for whose benefit the deposit was made of any proceedings taken adversely to his interest in the thing deposited which may tend to excuse the depositary from delivering the thing to him.

**History: En. Sec. 2453, Civ. C. 1895; re-en. Sec. 5142, Rev. C. 1907; re-en. Sec. 7645, R.C.M. 1921; Cal. Civ. C. Sec. 1825; Field Civ. C. Sec. 916; re-en. Sec. 7645, R.C.M. 1935; R.C.M. 1947, 20-110.**

**70-6-209. Notice to true owner of thing wrongfully detained.** A depositary, who believes that a thing deposited with him is wrongfully detained from its true owner, may give him notice of the deposit, and if within a reasonable time afterwards he does not claim it and sufficiently establish his right thereto and indemnify the depositary against the claim of the depositor, the depositary is exonerated from liability to the person to whom he gave the notice upon returning the thing to the depositor or assuming, in good faith, a new obligation changing his position in respect to the thing to his prejudice.

**History: En. Sec. 2454, Civ. C. 1895; re-en. Sec. 5143, Rev. C. 1907; re-en. Sec. 7646, R.C.M. 1921; Cal. Civ. C. Sec. 1826; Field Civ. C. Sec. 917; re-en. Sec. 7646, R.C.M. 1935; R.C.M. 1947, 20-111.**

**70-6-210. Depositor to indemnify depositary — damage — expenses.** A depositor must indemnify the depositary for:

(1) all damage caused to him by the defects or vices of the thing deposited; and

(2) all expenses necessarily incurred by him about the thing, other than such as are involved in the nature of the undertaking.

**History: En. Sec. 2460, Civ. C. 1895; re-en. Sec. 5145, Rev. C. 1907; re-en. Sec. 7648, R.C.M. 1921; Cal. Civ. C. Sec. 1833; Field Civ. C. Sec. 919; re-en. Sec. 7648, R.C.M. 1935; R.C.M. 1947, 20-201.**

**70-6-211. Depositary to deliver on demand.** A depositary must deliver the thing to the person for whose benefit it was deposited, on demand, whether the deposit was made for a specified time or not, unless he has a lien upon the thing deposited or has been forbidden or prevented from doing so by the real owner thereof or by the act of the law and has given the notice required by 70-6-208.

**History: En. Sec. 2450, Civ. C. 1895; re-en. Sec. 5139, Rev. C. 1907; re-en. Sec. 7642, R.C.M. 1921; Cal. Civ. C. Sec. 1822; Field Civ. C. Sec. 913; re-en. Sec. 7642, R.C.M. 1935; R.C.M. 1947, 20-107.**

**70-6-212. No duty to deliver without demand.** A depositary is not bound to deliver a thing deposited without demand even where the deposit is made for a specified time.

**History: En. Sec. 2451, Civ. C. 1895; re-en. Sec. 5140, Rev. C. 1907; re-en. Sec. 7643, R.C.M. 1921; Cal. Civ. C. Sec. 1823; Field Civ. C. Sec. 914; re-en. Sec. 7643, R.C.M. 1935; R.C.M. 1947, 20-108.**

**70-6-213. Place of delivery.** A depositary must deliver the thing deposited at his residence or place of business as may be most convenient for him.

**History: En. Sec. 2452, Civ. C. 1895; re-en. Sec. 5141, Rev. C. 1907; re-en. Sec. 7644, R.C.M. 1921; Cal. Civ. C. Sec. 1824; Field Civ. C. Sec. 915; re-en. Sec. 7644, R.C.M. 1935; R.C.M. 1947, 20-109.**

**70-6-214. Delivery of thing owned jointly.** If a thing deposited is owned jointly or in common by persons who cannot agree upon the manner of its delivery, the depositary may deliver to each his proper share thereof if it can be done without injury to the thing.

**History: En. Sec. 2455, Civ. C. 1895; re-en. Sec. 5144, Rev. C. 1907; re-en. Sec. 7647, R.C.M. 1921; Cal. Civ. C. Sec. 1827; Field Civ. C. Sec. 918; re-en. Sec. 7647, R.C.M. 1935; R.C.M. 1947, 20-112.**

## Part 3

## Gratuitous Deposits

**70-6-301. Gratuitous deposit defined.** Gratuitous deposit is a deposit for which the depositary receives no consideration beyond the mere possession of the thing deposited.

**History: En. Sec. 2480, Civ. C. 1895; re-en. Sec. 5153, Rev. C. 1907; re-en. Sec. 7656, R.C.M. 1921; Cal. Civ. C. Sec. 1844; Field Civ. C. Sec. 927; re-en. Sec. 7656, R.C.M. 1935; R.C.M. 1947, 20-209.**

**70-6-302. Degree of care required of gratuitous depositary.** A gratuitous depositary must use at least slight care for the preservation of the thing deposited.

**History: En. Sec. 2482, Civ. C. 1895; re-en. Sec. 5155, Rev. C. 1907; re-en. Sec. 7658, R.C.M. 1921; Cal. Civ. C. Sec. 1846; Field Civ. C. Sec. 929; re-en. Sec. 7658, R.C.M. 1935; R.C.M. 1947, 20-211.**

**70-6-303. When duties of gratuitous depositary cease.** The duties of a gratuitous depositary cease upon his:

(1) restoring the thing deposited to its owner; or

(2) giving reasonable notice to the owner to remove it and the owner failing to do so within a reasonable time. But an involuntary depositary under 70-6-103(2) cannot give such notice until the emergency which gave rise to the deposit is past.

**History: En. Sec. 2483, Civ. C. 1895; re-en. Sec. 5156, Rev. C. 1907; re-en. Sec. 7659, R.C.M. 1921; Cal. Civ. C. Sec. 1847; Field Civ. C. Sec. 930; re-en. Sec. 7659, R.C.M. 1935; R.C.M. 1947, 20-212.**

## Part 4

## Deposit for Hire — Storage

**70-6-401. Applicability — Uniform Commercial Code.** The provisions of this part apply only to the extent not otherwise provided for in the Uniform Commercial Code.

**History: En. 20-314 by Sec. 11-116, Ch. 264, L. 1963; R.C.M. 1947, 20-314.**

**70-6-402. Deposit for hire defined.** A deposit not gratuitous is called storage. The depositary in such case is called a depositary for hire.

**History: En. Sec. 2490, Civ. C. 1895; re-en. Sec. 5157, Rev. C. 1907; re-en. Sec. 7660, R.C.M. 1921; Cal. Civ. C. Sec. 1851; Field Civ. C. Sec. 931; re-en. Sec. 7660, R.C.M. 1935; R.C.M. 1947, 20-301.**

**70-6-403. Degree of care required of depositary for hire.** A depositary for hire must use at least ordinary care for the preservation of the thing deposited.

**History: En. Sec. 2491, Civ. C. 1895; re-en. Sec. 5158, Rev. C. 1907; re-en. Sec. 7661, R.C.M. 1921; Cal. Civ. C. Sec. 1852; Field Civ. C. Sec. 932; re-en. Sec. 7661, R.C.M. 1935; R.C.M. 1947, 20-302.**

**70-6-404. Rate of compensation for fraction of week or half month.** In the absence of a different agreement or usage, a depositary for hire is entitled to 1 week's hire for the sustenance and shelter of living animals during any fraction of a week and to half a month's hire for the storage of any other property during any fraction of a half month.

**History: En. Sec. 2492, Civ. C. 1895; re-en. Sec. 5159, Rev. C. 1907; re-en. Sec. 7662, R.C.M. 1921; Cal. Civ. C. Sec. 1853; Field Civ. C. Sec. 933; re-en. Sec. 7662, R.C.M. 1935; R.C.M. 1947, 20-303.**

**70-6-405. Termination of deposit.** (1) In the absence of an agreement as to the length of time during which a deposit is to continue, it may be terminated by the depositor at any time and by the depositary upon a reasonable notice.

(2) Notwithstanding an agreement respecting the length of time during which a deposit is to continue, it may be terminated by the depositor on paying all that would become due to the depositary in case of the deposit so continuing.

**History: En. Secs. 2493, 2494, Civ. C. 1895; re-en. Secs. 5160, 5161, Rev. C. 1907; re-en. Secs. 7663, 7664, R.C.M. 1921; Cal. Civ. C. Secs. 1854, 1855; Field Civ. C. Secs. 934, 935; re-en. Secs. 7663, 7664, R.C.M. 1935; R.C.M. 1947, 20-304, 20-305.**

**70-6-406 through 70-6-410 reserved.**

**70-6-411. Sale to pay costs of storage.** (1) Any storage or commission merchant receiving personal property from any person for storage and any common carrier of goods by whom any personal property is lawfully stored before or after the transportation thereof may, after keeping the same in store for 90 days, in default of the payment of the storage or freight money on such personal property, advertise and sell the same at public auction to the highest bidder for cash, first giving notice of the time, the terms, and place of sale and a description of the property to be sold by publication in some newspaper published in the county where the property may be stored. Said notice shall be published at least once a week for 4 weeks next previous to the day of sale and shall specify the amount due on the property to be sold. When a specified time has been agreed upon between the parties for the storage of said property, the same shall not be advertised until the expiration of the time agreed upon.

(2) Should there be no newspaper published in the county where such property is stored, then notice may be given in the newspaper published nearest thereto in some other county in this state.

(3) But no more of such property shall be sold than is necessary to pay the charges due, together with the costs.

**History: En. Sec. 1, p. 544, Cod. Stat. 1871; re-en. Sec. 1179, 5th Div. Rev. Stat. 1879; re-en. Sec. 1983, 5th Div. Comp. Stat. 1887; amd. Sec. 2495, Civ. C. 1895; amd. Sec. 1, p. 153, L. 1901; re-en. Sec. 5162, Rev. C. 1907; re-en. Sec. 7665, R.C.M. 1921; Cal. Civ. C. Secs. 1856, 1857; re-en. Sec. 7665, R.C.M. 1935; R.C.M. 1947, 20-306.**

**70-6-412. Application of proceeds of sale.** (1) After paying the expenses of sale, including the publication of notice, the storage or commission merchant or the carrier shall be authorized, out of the proceeds arising from the sale of the property, to retain the amount due him for storage or freight money, or both, due upon any such property, and the excess, if any, must be paid over to the person entitled to the proceeds thereof.

(2) All sales under this part shall vest the title to the property sold in the purchaser thereof.

**History: En. Sec. 3, p. 545, Cod. Stat. 1871; re-en. Sec. 1181, 5th Div. Rev. Stat. 1879; re-en. Sec. 1895, 5th Div. Comp. Stat. 1887; amd. Sec. 2496, Civ. C. 1895; re-en. Sec. 2, p. 153, L. 1901; re-en. Sec. 5163, Rev. C. 1907; re-en. Sec. 7666, R.C.M. 1921; re-en. Sec. 7666, R.C.M. 1935; R.C.M. 1947, 20-307.**

## Part 5

## Innkeepers

**70-6-501. Innkeeper's liability as to property of guests — dollar limitation.** (1) An innkeeper is liable for all losses of or injuries to personal property placed by his guests under his care unless occasioned by an irresistible superhuman cause, by a public enemy, by the negligence of the owner, or by the act of someone whom he brought into the inn.

(2) The liability provided for in subsection (1) may not exceed $500 for all personal property of each registered guest unless the innkeeper consents in writing with the guest to assume a greater liability. An innkeeper whose liability is so limited shall notify the guest at the time of registration, in writing, that this limitation applies.

**History: En. Sec. 2500, Civ. C. 1895; re-en. Sec. 5164, Rev. C. 1907; re-en. Sec. 7673, R.C.M. 1921; Cal. Civ. C. Sec. 1859; Field Civ. C. Sec. 936; re-en. Sec. 7673, R.C.M. 1935; amd. Sec. 1, Ch. 14, L. 1977; R.C.M. 1947, 34-101.**

**70-6-502. No liability without negligence.** No hotelkeeper or innkeeper shall be liable to any guest for the loss of wearing apparel, goods, or personal effects where it shall appear that such loss occurred without the fault or negligence of such hotelkeeper or his employees.

**History: En. Sec. 2510, Civ. C. 1895; re-en. Sec. 5174, Rev. C. 1907; re-en. Sec. 7681, R.C.M. 1921; re-en. Sec. 7681, R.C.M. 1935; R.C.M. 1947, 34-109.**

**70-6-503. Loss or damage by fire — liability for negligence.** All innkeepers or hotelkeepers coming within the provisions of this part shall be liable for loss of or damage to any baggage or other property of their guests caused by fire in every case where such loss or damage is the result of the negligence of such keepers or their servants.

**History: En. Sec. 2509, Civ. C. 1895; re-en. Sec. 5173, Rev. C. 1907; re-en. Sec. 7680, R.C.M. 1921; re-en. Sec. 7680, R.C.M. 1935; R.C.M. 1947, 34-108.**

**70-6-504. How exempted from liability — safe.** (1) If an innkeeper keeps a fireproof safe and gives notice to a guest, either personally or by putting up a printed notice in a prominent place in the room occupied by the guest, that he keeps such a safe and will not be liable for money, jewelry, documents, or other articles of unusual value and small compass unless placed therein, he is not liable, except so far as his own acts contribute thereto, for any loss of or injury to such articles, if not deposited with him and not required by the guest for present use.

(2) Whenever the proprietor or proprietors of any hotel or inn shall provide a safe or other secure place of deposit therein for the safekeeping of any money, jewels, ornaments, or other articles of value belonging to any guest or guests of such hotel or inn and shall cause to be posted and maintained printed notices thereof in the office or public room and within every guest's room of such inn or hotel, the proprietor or proprietors thereof shall not be liable to any such guest or guests who shall neglect to deliver their money, jewels, ornaments, or other articles of value to the proprietor or other person in charge of such safe or place of deposit for deposit and safekeeping therein for any loss of such money or other articles which may be sustained by such guest by theft or otherwise.

**History: (1)En. Sec. 2501, Civ. C. 1895; re-en. Sec. 5165, Rev. C. 1907; re-en. Sec. 7674, R.C.M. 1921; Cal. Civ. C. Sec. 1860; Field. Civ. C. Sec. 937; re-en. Sec. 7674, R.C.M. 1935; Sec. 34-102, R.C.M. 1947; (2)En. Sec. 2504, Civ. C. 1895; re-en. Sec. 5168, Rev. C. 1907; re-en. Sec. 7677, R.C.M. 1921; Cal. Civ. C. Sec. 1860; re-en. Sec. 7677, R.C.M. 1935; Sec. 34-105, R.C.M. 1947; R.C.M. 1947, 34-102, 34-105.**

**70-6-505. Storage of property in outbuilding — nonliability.** No innkeeper shall be liable for the loss or destruction by fire of the property received by him from a guest, stored or being, with the knowledge of such guest, in a barn or other outbuilding, where it shall appear that such loss or destruction is the work of an incendiary and occurred without the fault or negligence of such innkeeper or his servants.

**History: En. Sec. 2508, Civ. C. 1895; re-en. Sec. 5172, Rev. C. 1907; re-en. Sec. 7679, R.C.M. 1921; re-en. Sec. 7679, R.C.M. 1935; R.C.M. 1947, 34-107.**

# CHAPTER 7

# LOANS FOR USE OR EXCHANGE PERSONAL PROPERTY

## Part 1 — Loan for Use

Section
70-7-101. Optional loan — use or exchange — applicability of entire chapter.
70-7-102. Loan for use defined.

70-7-103. Title not transferred — increase.
70-7-104. Care required of borrower generally.
70-7-105. Borrower of animal — care required.
70-7-106. Skill required of borrower.
70-7-107. Borrower to repair injuries.
70-7-108. Use of thing lent — what permitted.
70-7-109. Relending forbidden.
70-7-110. Who to bear expenses.
70-7-111. Lender liable for concealed defects.
70-7-112. Right of lender to require return — indemnification of borrower.
70-7-113. When returnable without demand.
70-7-114. Place of return.

**Part 2 — Loan for Exchange**

70-7-201. Certain sections of previous part applicable.
70-7-202. Loan for exchange defined.
70-7-203. Title to property lent — expenses — increase.
70-7-204. Contract not to be modified by lender.

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## Part 1

## Loan for Use

**70-7-101. Optional loan — use or exchange — applicability of entire chapter.** A loan which the borrower is allowed by the lender to treat as a loan for use or for exchange, at his option, is subject to all of the provisions of this chapter.

**History: En. Sec. 2571, Civ. C. 1895; re-en. Sec. 5202, Rev. C. 1907; re-en. Sec. 7716, R.C.M. 1921; Cal. Civ. C. Sec. 1903; Field Civ. C. Sec. 962; re-en. Sec. 7716, R.C.M. 1935; R.C.M. 1947, 47-115.**

**70-7-102. Loan for use defined.** A loan for use is a contract by which one gives to another the temporary use and possession of personal property, and the latter agrees to return the same thing to him at a future time, without reward for its use.

**History: En. Sec. 2550, Civ. C. 1895; re-en. Sec. 5188, Rev. C. 1907; re-en. Sec. 7702, R.C.M. 1921; Cal. Civ. C. Sec. 1884; Field Civ. C. Sec. 948; re-en. Sec. 7702, R.C.M. 1935; R.C.M. 1947, 47-101.**

**70-7-103. Title not transferred — increase.** A loan for use does not transfer the title to the thing, and all its increase during the period of the loan belongs to the lender.

**History: En. Sec. 2551, Civ. C. 1895; re-en. Sec. 5189, Rev. C. 1907; re-en. Sec. 7703, R.C.M. 1921; Cal. Civ. C. Sec. 1885; Field Civ. C. Sec. 949; re-en. Sec. 7703, R.C.M. 1935; R.C.M. 1947, 47-102.**

**70-7-104. Care required of borrower generally.** A borrower for use must use great care for the preservation in safety and in good condition of the thing lent.

**History: En. Sec. 2552, Civ. C. 1895; re-en. Sec. 5190, Rev. C. 1907; re-en. Sec. 7704, R.C.M. 1921; Cal. Civ. C. Sec. 1886; Field Civ. C. Sec. 950; re-en. Sec. 7704, R.C.M. 1935; R.C.M. 1947, 47-103.**

**70-7-105. Borrower of animal — care required.** One who borrows a living animal for use must treat it with great kindness and provide everything necessary and suitable for it.

**History: En. Sec. 2553, Civ. C. 1895; re-en. Sec. 5191, Rev. C. 1907; re-en. Sec. 7705, R.C.M. 1921; Cal. Civ. C. Sec. 1887; Field Civ. C. Sec. 951; re-en. Sec. 7705, R.C.M. 1935; R.C.M. 1947, 47-104.**

**70-7-106. Skill required of borrower.** A borrower for use is bound to have and to exercise such skill in the care of the thing lent as he causes the lender to believe him to possess.

**History: En. Sec. 2554, Civ. C. 1895; re-en. Sec. 5192, Rev. C. 1907; re-en. Sec. 7706, R.C.M. 1921; Cal. Civ. C. Sec. 1888; Field Civ. C. Sec. 952; re-en. Sec. 7706, R.C.M. 1935; R.C.M. 1947, 47-105.**

**70-7-107. Borrower to repair injuries.** A borrower for use must repair all deteriorations or injuries to the thing lent which are occasioned by his negligence, however slight.

**History: En. Sec. 2555, Civ. C. 1895; re-en. Sec. 5193, Rev. C. 1907; re-en. Sec. 7707, R.C.M. 1921; Cal. Civ. C. Sec. 1889; Field Civ. C. Sec. 953; re-en. Sec. 7707, R.C.M. 1935; R.C.M. 1947, 47-106.**

**70-7-108. Use of thing lent — what permitted.** The borrower of a thing for use may use it for such purposes only as the lender might reasonably anticipate at the time of lending.

**History: En. Sec. 2556, Civ. C. 1895; re-en. Sec. 5194, Rev. C. 1907; re-en. Sec. 7708, R.C.M. 1921; Cal. Civ. C. Sec. 1890; Field Civ. C. Sec. 954; re-en. Sec. 7708, R.C.M. 1935; R.C.M. 1947, 47-107.**

**70-7-109. Relending forbidden.** The borrower of a thing for use must not part with it to a third person without the consent of the lender.

**History: En. Sec. 2557, Civ. C. 1895; re-en. Sec. 5195, Rev. C. 1907; re-en. Sec. 7709, R.C.M. 1921; Cal. Civ. C. Sec. 1891; Field Civ. C. Sec. 955; re-en. Sec. 7709, R.C.M. 1935; R.C.M. 1947, 47-108.**

**70-7-110. Who to bear expenses.** The borrower of a thing for use must bear all its expenses during the loan, except such as are necessarily incurred by him to preserve it from unexpected and unusual injury. For such expenses he is entitled to compensation from the lender, who may, however, exonerate himself by surrendering the thing to the borrower.

**History: En. Sec. 2558, Civ. C. 1895; re-en. Sec. 5196, Rev. C. 1907; re-en. Sec. 7710, R.C.M. 1921; Cal. Civ. C. Sec. 1892; Field Civ. C. Sec. 956; re-en. Sec. 7710, R.C.M. 1935; R.C.M. 1947, 47-109.**

**70-7-111. Lender liable for concealed defects.** The lender of a thing for use must indemnify the borrower for damage caused by defects or vices in it which he knew at the time of lending and concealed from the borrower.

**History: En. Sec. 2559, Civ. C. 1895; re-en. Sec. 5197, Rev. C. 1907; re-en. Sec. 7711, R.C.M. 1921; Cal. Civ. C. Sec. 1893; Field Civ. C. Sec. 957; re-en. Sec. 7711, R.C.M. 1935; R.C.M. 1947, 47-110.**

**70-7-112. Right of lender to require return — indemnification of borrower.** The lender of a thing for use may at any time require its return, even though he lent it for a specified time or purpose. But if on the faith of such an agreement the borrower has made such arrangements that a return of the thing before the period agreed upon would cause him loss exceeding the benefit derived by him from the loan, the lender must indemnify him for such loss if he compels such return, the borrower not having in any manner violated his duty.

**History: En. Sec. 2560, Civ. C. 1895; re-en. Sec. 5198, Rev. C. 1907; re-en. Sec. 7712, R.C.M. 1921; Cal. Civ. C. Sec. 1894; Field Civ. C. Sec. 958; re-en. Sec. 7712, R.C.M. 1935; R.C.M. 1947, 47-111.**

**70-7-113. When returnable without demand.** If a thing is lent for use for a specified time or purpose, it must be returned to the lender without demand as soon as the time has expired or the purpose has been accomplished. In other cases it need not be returned until demanded.

**History: En. Sec. 2561, Civ. C. 1895; re-en. Sec. 5199, Rev. C. 1907; re-en. Sec. 7713, R.C.M. 1921; Cal. Civ. C. Sec. 1895; Field Civ. C. Sec. 959; re-en. Sec. 7713, R.C.M. 1935; R.C.M. 1947, 47-112.**

**70-7-114. Place of return.** The borrower of a thing for use must return it to the lender at the place contemplated by the parties at the time of lending or, if no particular place was so contemplated by them, then at the place where it was at that time.

**History: En. Sec. 2562, Civ. C. 1895; re-en. Sec. 5200, Rev. C. 1907; re-en. Sec. 7714, R.C.M. 1921; Cal. Civ. C. Sec. 1896; Field Civ. C. Sec. 960; re-en. Sec. 7714, R.C.M. 1935; R.C.M. 1947, 47-113.**

## Part 2

## Loan for Exchange

**70-7-201. Certain sections of previous part applicable.** Sections 70-7-111, 70-7-112, and 70-7-113 apply to a loan for exchange.

**History: En. Sec. 2574, Civ. C. 1895; re-en. Sec. 5205, Rev. C. 1907; re-en. Sec. 7719, R.C.M. 1921; Cal. Civ. C. Sec. 1906; Field Civ. C. Sec. 965; re-en. Sec. 7719, R.C.M. 1935; R.C.M. 1947, 47-118.**

**70-7-202. Loan for exchange defined.** A loan for exchange is a contract by which one delivers personal property to another and the latter agrees to return to the lender a similar thing at a future time, without reward for its use.

**History: En. Sec. 2570, Civ. C. 1895; re-en. Sec. 5201, Rev. C. 1907; re-en. Sec. 7715, R.C.M. 1921; Cal. Civ. C. Sec. 1902; Field Civ. C. Sec. 961; re-en. Sec. 7715, R.C.M. 1935; R.C.M. 1947, 47-114.**

**70-7-203. Title to property lent — expenses — increase.** By a loan for exchange, the title to the thing lent is transferred to the borrower, and he must bear all its expenses and is entitled to all its increase.

**History: En. Sec. 2572, Civ. C. 1895; re-en. Sec. 5203, Rev. C. 1907; re-en. Sec. 7717, R.C.M. 1921; Cal. Civ. C. Sec. 1904; re-en. Sec. 7717, R.C.M. 1935; R.C.M. 1947, 47-116.**

**70-7-204. Contract not to be modified by lender.** A lender for exchange cannot require the borrower to fulfill his obligations at a time or in a manner different from that which was originally agreed upon.

**History: En. Sec. 2573, Civ. C. 1895; re-en. Sec. 5204, Rev. C. 1907; re-en. Sec. 7718, R.C.M. 1921; Cal. Civ. C. Sec. 1905; Field Civ. C. Sec. 964; re-en. Sec. 7718, R.C.M. 1935; R.C.M. 1947, 47-117.**

# CHAPTER 8

# RENTALS OF PERSONAL PROPERTY

**Part 1 — General Provisions**

Section
70-8-101. Duties of letter.
70-8-102. Ordinary expenses.
70-8-103. Extraordinary expenses.
70-8-104. Return of thing hired — time and place.

**Part 2 — Rental of Ships**

70-8-201. Contract for letting of ship.

## Part 1

## General Provisions

**70-8-101. Duties of letter.** One who lets personal property must deliver it to the hirer, secure his quiet enjoyment thereof against all lawful claimants, put it into a condition fit for the purpose for which he lets it, and repair all deteriorations thereof not occasioned by the fault of the hirer and not the natural result of its use.

**History: En. Sec. 2640, Civ. C. 1895; re-en. Sec. 5236, Rev. C. 1907; re-en. Sec. 7751, R.C.M. 1921; Cal. Civ. C. Sec. 1955; Field Civ. C. Sec. 999; re-en. Sec. 7751, R.C.M. 1935; R.C.M. 1947, 42-211.**

**70-8-102. Ordinary expenses.** A hirer of personal property must bear all such expenses concerning it as might naturally be foreseen to attend it during its use by him. All other expenses must be borne by the letter.

**History: En. Sec. 2641, Civ. C. 1895; re-en. Sec. 5237, Rev. C. 1907; re-en. Sec. 7752, R.C.M. 1921; Cal. Civ. C. Sec. 1956; Field Civ. C. Sec. 1000; re-en. Sec. 7752, R.C.M. 1935; R.C.M. 1947, 42-212.**

**70-8-103. Extraordinary expenses.** If a letter fails to fulfill his obligations as prescribed by 70-8-101, the hirer, after giving him notice to do so if such notice can conveniently be given, may expend any reasonable amount necessary to make good the letter's default and may recover such amount from him.

**History: En. Sec. 2642, Civ. C. 1895; re-en. Sec. 5238, Rev. C. 1907; re-en. Sec. 7753, R.C.M. 1921; Cal. Civ. C. Sec. 1957; Field Civ. C. Sec. 1001; re-en. Sec. 7753, R.C.M. 1935; R.C.M. 1947, 42-213.**

**70-8-104. Return of thing hired — time and place.** At the expiration of the term for which personal property is hired, the hirer must return it to the letter at the place contemplated by the parties at the time of hiring or, if no particular place was so contemplated by them, at the place at which it was at that time.

**History: En. Sec. 2643, Civ. C. 1895; re-en. Sec. 5239, Rev. C. 1907; re-en. Sec. 7754, R.C.M. 1921; Cal. Civ. C. Sec. 1958; Field Civ. C. Sec. 1002; re-en. Sec. 7754, R.C.M. 1935; R.C.M. 1947, 42-214.**

### Part 2

### Rental of Ships

**70-8-201. Contract for letting of ship.** The contract by which a ship is let is termed a charter party. By it the owner may either let the capacity or burden of the ship, continuing the employment of the owner's master, crew, and equipments, or may surrender the entire ship to the charterer, who then provides them himself. The master or part owner may be a charterer.

**History: En. Sec. 2644, Civ. C. 1895; re-en. Sec. 5240, Rev. C. 1907; re-en. Sec. 7755, R.C.M. 1921; Cal. Civ. C. Sec. 1959; Field Civ. C. Sec. 1003; re-en. Sec. 7755, R.C.M. 1935; R.C.M. 1947, 42-215.**

# CHAPTER 9

# DISPOSITION OF UNCLAIMED PROPERTY

### Part 1 — General Provisions

Section

70-9-101. Short title.
70-9-102. Definitions.
70-9-103. Nonapplicability — property abandoned or escheated under law of other state — reciprocity.
70-9-104. Uniformity of interpretation.
70-9-105. Department rulemaking — representation by assistant attorney general.

### Part 2 — Presumption of Abandonment Kinds of Property

70-9-201. Property held by banking or financial organization or business association.
70-9-202. Unclaimed funds held by life insurance corporation.
70-9-203. Deposits and refunds held by utility.
70-9-204. Stock, dividends, and distributions of business association.
70-9-205. Property of business association or of banking or financial organization held in course of dissolution.
70-9-206. Property held by fiduciary.
70-9-207. Property held by court or public officer or agency.
70-9-208. Miscellaneous property held for another person.

### Part 3 — Procedure

70-9-301. Report of abandoned property — duty to prevent abandonment prior to filing.
70-9-302. Notice of property presumed abandoned — publication — mail.
70-9-303. Payment or delivery of abandoned property to department.
70-9-304. Relief from liability by payment or delivery to department.
70-9-305. Reimbursement to holder for payment to owner or other state.
70-9-306. Income accruing after payment or delivery to department.
70-9-307. Period of limitations not to prevent presumption or affect duties.
70-9-308. Sale of abandoned property — notice — title of purchaser.
70-9-309. Deposit of moneys — record — deduction of costs.
70-9-310. Claim for property paid or delivered — filing.
70-9-311. Determination and payment of claim.
70-9-312. Appeal to court from decision of tax board — trial de novo.
70-9-313. Prerogative of department to decline receipt of property.
70-9-314. Examination of records for failure to report.
70-9-315. Proceeding to compel delivery of property.
70-9-316. Penalties.

### Part 4 — Common Carriers, Commission Merchants, and Warehousemen

70-9-401. Applicability — Uniform Commercial Code.
70-9-402. Storage of unclaimed property.
70-9-403. Property unclaimed within 90 days to be sold — notice — surplus.
70-9-404. Surplus proceeds unclaimed — disposition.
70-9-405. Responsibility of carrier and bailee after storage.
70-9-406. Sale of property upon which advances are due.
70-9-407. Fees of officers.

### Part 5 — Innkeepers

70-9-501. Sale of unclaimed baggage — notice.
70-9-502. Disposition of surplus proceeds.

## Part 1

## General Provisions

**70-9-101. Short title.** Parts 1 through 3 of this chapter may be cited as the "Uniform Disposition of Unclaimed Property Act".

**History: En. Sec. 30, Ch. 244, L. 1963; R.C.M. 1947, 67-2230.**

**70-9-102. Definitions.** As used in parts 1 through 3, unless the context otherwise requires, the following definitions apply:

(1) "Banking organization" means any bank, national bank, trust company, savings bank, industrial bank, land bank, safe deposit company, or a private banker engaged in business in this state.

(2) "Business association" means any corporation, other than a public corporation, joint-stock company, business trust, partnership, or any association for business purposes of two or more individuals.

(3) "Financial organization" means any savings and loan association, building and loan association, credit union, cooperative bank, or investment company engaged in business in this state.

(4) "Holder" means any person in possession of property subject to parts 1 through 3 belonging to another or who is trustee in case of a trust or is indebted to another on an obligation subject to parts 1 through 3.

(5) "Life insurance corporation" means any association or corporation transacting within this state the business of insurance on the lives of persons or insurance appertaining thereto, including, but not by way of limitation, endowments and annuities.

(6) "Owner" means a depositor in case of a deposit, a beneficiary in case of a trust, or creditor, claimant, or payee in case of other choses in action or any person having a legal or equitable interest in property subject to parts 1 through 3 or his legal representative.

(7) "Person" means any individual, business association, government or political subdivision, public corporation, public authority, estate, trust, two or more persons having a joint or common interest, or any other legal or commercial entity.

(8) "Utility" means any person who owns or operates within this state for public use any plant, equipment, property, franchise, or license for the transmission of communications or the production, storage, transmission, sale, delivery, or furnishing of electricity, water, steam, or gas.

**History: En. Sec. 1, Ch. 244, L. 1963; R.C.M. 1947, 67-2201.**

**70-9-103. Nonapplicability — property abandoned or escheated under law of other state — reciprocity.** (1) Parts 1 through 3 shall not apply to any property that has been presumed abandoned or escheated under the laws of another state prior to July 1, 1963.

(2) If specific property which is subject to the provisions of 70-9-201, 70-9-204, 70-9-205, 70-9-206, and 70-9-208 is held for or owed or distributable to an owner whose last known address is in another state by a holder who is subject to the jurisdiction of that state, the specific property is not presumed abandoned in this state and subject to parts 1 through 3 if:

(a) it may be claimed as abandoned or escheated under the laws of such other state; and

(b) the laws of such other state make reciprocal provision that similar specific property is not presumed abandoned or escheatable by such other state when held for or owed or distributable to an owner whose last known address is within this state by a holder who is subject to the jurisdiction of this state.

**History: En. Secs. 10, 27, Ch. 244, L. 1963; R.C.M. 1947, 67-2210, 67-2227.**

**70-9-104. Uniformity of interpretation.** Parts 1 through 3 shall be so construed as to effectuate their general purpose to make uniform the law of those states which enact the act.

**History: En. Sec. 29, Ch. 244, L. 1963; R.C.M. 1947, 67-2229.**

**70-9-105. Department rulemaking — representation by assistant attorney general.** The department of revenue is hereby authorized to make necessary rules to carry out the provisions of parts 1 through 3 and shall be represented in the enforcement of the provisions of those parts by the special assistant attorney general in charge of escheated estates.

**History: En. Sec. 26, Ch. 244, L. 1963; amd. Sec. 16, Ch. 216, L. 1971; amd. Sec. 39, Ch. 391, L. 1973; R.C.M. 1947, 67-2226.**

## Part 2

## Presumption of Abandonment
## Kinds of Property

**70-9-201. Property held by banking or financial organization or business association.** The following property held or owing by a banking or financial organization or by a business association is presumed abandoned:

(1) any demand, savings, or matured time deposit made in this state with a banking organization, together with any interest or dividend thereon, excluding any charges that may lawfully be withheld, unless the owner has within 7 years:

(a) increased or decreased the amount of the deposit or presented the passbook or other similar evidence of the deposit for the crediting of interest;

(b) corresponded in writing with the banking organization concerning the deposit; or

(c) otherwise indicated an interest in the deposit as evidenced by a memorandum on file with the banking organization;

(2) any funds paid in this state toward the purchase of shares or other interest in a financial organization or any deposit made therewith in this state and any interest or dividends thereon, excluding any charges that may lawfully be withheld, unless the owner has within 7 years:

(a) increased or decreased the amount of the funds or deposit or presented an appropriate record for the crediting of interest or dividends;

(b) corresponded in writing with the financial organization concerning the funds or deposit; or

(c) otherwise indicated an interest in the funds or deposit as evidenced by a memorandum on file with the financial organization;

(3) any sum payable on checks certified in this state or on written instruments issued in this state on which a banking or financial organization or business association is directly liable, including, by way of illustration but not of limitation, certificates of deposit, drafts, money orders, and travelers' checks that, with the exception of travelers' checks, has been outstanding for more than 7 years from the date it was payable or from the date of its issuance if payable on demand or, in the case of travelers' checks, that has been outstanding for more than 15 years from the date of its issuance unless the owner has within 7 years or within 15 years in the case of travelers' checks corresponded in writing with the banking or financial organization or business association concerning it or otherwise indicated an interest as evidenced by a memorandum on file with the banking or financial organization or business association;

(4) any funds or other personal property, tangible or intangible, removed from a safe deposit box or any other safekeeping repository or agency or collateral deposit box in this state on which the lease or rental period has expired due to nonpayment of rental charges or other reason or any surplus amounts arising from the sale thereof pursuant to law that have been unclaimed by the owner for more than 7 years from the date on which the lease or rental period expired.

**History: En. Sec. 2, Ch. 244, L. 1963; amd. Sec. 1, Ch. 226, L. 1967; R.C.M. 1947, 67-2202.**

**70-9-202. Unclaimed funds held by life insurance corporation.** (1) Unclaimed funds, as defined in this section, held and owing by a life insurance corporation shall be presumed abandoned if the last known address, according to the records of the corporation, of the person entitled to the funds is within this state. If a person other than the insured or annuitant is entitled to the funds and no address of such person is known to the corporation or if it is not definite and certain from the records of the corporation what person is entitled to the funds, it is presumed that the last known address of the person entitled to the funds is the same as the last known address of the insured or annuitant according to the records of the corporation.

(2) "Unclaimed funds", as used in this section, means all moneys held and owing by any life insurance corporation unclaimed and unpaid for more than 7 years after the moneys became due and payable as established from the records of the corporation under any life or endowment insurance policy or annuity contract which has matured or terminated. A life insurance policy not matured by actual proof of the death of the insured is deemed to be matured and the proceeds thereof are deemed to be due and payable if such policy was in force when the insured attained the limiting age under the mortality table on which the reserve is based unless the person appearing entitled thereto has within the preceding 7 years assigned, readjusted, or paid premiums on the policy or subjected the policy to loan or corresponded in writing with the life insurance corporation concerning the policy. Moneys otherwise payable according to the records of the corporation are deemed due and payable although the policy or contract has not been surrendered as required.

**History: En. Sec. 3, Ch. 244, L. 1963; R.C.M. 1947, 67-2203.**

**70-9-203. Deposits and refunds held by utility.** The following funds held or owing by any utility are presumed abandoned:

(1) any deposit made by a subscriber with a utility to secure payment for or any sum paid in advance for utility services to be furnished in this state, less any lawful

deductions, that has remained unclaimed by the person appearing on the records of the utility entitled thereto for more than 7 years after the termination of the services for which the deposit or advance payment was made;

(2) any sum which a utility has been ordered to refund and which was received for utility services rendered in this state, together with any interest thereon, less any lawful deductions, that has remained unclaimed by the person appearing on the records of the utility entitled thereto for more than 7 years after the date it became payable in accordance with the final determination or order providing for the refund.

**History: En. Sec. 4, Ch. 244, L. 1963; R.C.M. 1947, 67-2204.**

**70-9-204. Stock, dividends, and distributions of business association.** Any stock or other certificate of ownership or any dividend, profit, distribution, interest, payment on principal, or other sum held or owing by a business association for or to a shareholder, certificate holder, member, bondholder, or other security holder or a participating patron of a cooperative, who has not claimed it or corresponded in writing with the business association concerning it within 7 years after the date prescribed for payment or delivery is presumed abandoned if it is held or owing by a business association:

(1) organized under the laws of or created in this state; or

(2) doing business in this state but not organized under the laws of or created in this state and the records of the business association indicate that the last known address of the person entitled thereto is in this state.

**History: En. Sec. 5, Ch. 244, L. 1963; R.C.M. 1947, 67-2205.**

**70-9-205. Property of business association or of banking or financial organization held in course of dissolution.** All intangible personal property distributable in the course of a voluntary dissolution of a business association, banking organization, or financial organization organized under the laws of or created in this state that is unclaimed by the owner within 2 years after the date for final distribution is presumed abandoned.

**History: En. Sec. 6, Ch. 244, L. 1963; R.C.M. 1947, 67-2206.**

**70-9-206. Property held by fiduciary.** All intangible personal property and any income or increment thereon held in a fiduciary capacity for the benefit of another person is presumed abandoned unless the owner has, within 7 years after it becomes payable or distributable, increased or decreased the principal, accepted payment of principal or income, corresponded in writing concerning the property, or otherwise indicated an interest as evidenced by a memorandum on file with the fiduciary:

(1) if the property is held by a business association, banking organization, or financial organization organized under the laws of or created in this state;

(2) if it is held by a business association, banking organization, or financial organization doing business in this state but not organized under the laws of or created in this state and the records of the business association, banking organization, or financial organization indicate that the last known address of the person entitled thereto is in this state; or

(3) if it is held in this state by another person.

**History: En. Sec. 7, Ch. 244, L. 1963; R.C.M. 1947, 67-2207.**

**70-9-207. Property held by court or public officer or agency.** All intangible personal property held for the owner by any court, public corporation, public authority, or public officer of this state or a political subdivision thereof that has remained unclaimed by the owner for more than 7 years is presumed abandoned.

**History: En. Sec. 8, Ch. 244, L. 1963; R.C.M. 1947, 67-2208.**

**70-9-208. Miscellaneous property held for another person.** All intangible personal property not otherwise covered by parts 1 through 3, including any income or increment thereon and deducting any lawful charges, that is held or owing in this state in the ordinary course of the holder's business and has remained unclaimed by the owner for more than 7 years after it became payable or distributable is presumed abandoned.

**History: En. Sec. 9, Ch. 244, L. 1963; R.C.M. 1947, 67-2209.**

## Part 3

## Procedure

**70-9-301. Report of abandoned property — duty to prevent abandonment prior to filing.** (1) Every person holding moneys or other property, tangible or intangible, presumed abandoned under parts 1 through 3 shall report the property to the department of revenue as hereinafter provided.

(2) The report shall be verified and shall include:

(a) except with respect to travelers' checks and money orders, the name, if known, and last known address, if any, of each person appearing from the records of the holder to be the owner of any property of value of $10 or more presumed abandoned under parts 1 through 3;

(b) in case of unclaimed moneys of life insurance corporations, the full name of the insured or annuitant and his last known address according to the life insurance corporation's records;

(c) the nature and identifying number, if any, or description of the property and the amount appearing from the records to be due. Items of value under $10 each may be reported in aggregate.

(d) the date when the property became payable, demandable, or returnable and the date of the last transaction with the owner with respect to the property; and

(e) other information which the department of revenue prescribes by rule as necessary for the administration of parts 1 through 3.

(3) If the person holding property presumed abandoned is a successor to other persons who previously held the property for the owner or if the holder has changed his name while holding the property, he shall file with his report all prior known names and addresses of each holder of the property.

(4) The report shall be filed before November 1 every 3 years as of June 30 next preceding, but the reports of life insurance corporations, banking and financial organizations, and cooperatives shall be filed before May 1 of each year as of December 31 next preceding. The department may request that any other reports be filed each year. The department may postpone the reporting date upon written request by any person required to file a report. The department shall furnish forms for this report.

(5) If the holder of property presumed abandoned under parts 1 through 3 knows the whereabouts of the owner and if the owner's claim has not been barred by the statute of limitations, the holder shall before filing the annual report communicate with the owner and take necessary steps to prevent abandonment from being presumed. The holder shall exercise due diligence to ascertain the whereabouts of the owner.

(6) Verification if made by a partnership shall be executed by a partner; if made by an unincorporated association or private corporation, by an officer; and if made by a public corporation, by its chief fiscal officer.

**History: En. Sec. 11, Ch. 244, L. 1963; amd. Sec. 1, Ch. 21, L. 1967; amd. Sec. 2, Ch. 226, L. 1967; amd. Sec. 1, Ch. 216, L. 1971; amd. Sec. 24, Ch. 391, L. 1973; amd. Sec. 1, Ch. 195, L. 1977; R.C.M. 1947, 67-2211(1) thru (6).**

**70-9-302. Notice of property presumed abandoned — publication — mail.** (1) Within 120 days from the filing of the report required by 70-9-301, the department of revenue shall cause notice to be published at least once each week for 2 successive weeks in an English language newspaper of general circulation in the county in this state in which is located the last known address of any person to be named in the notice. If no address is listed or if the address is outside this state, the notice shall be published in the county in which the holder of the abandoned property has his principal place of business within this state.

(2) The published notice shall be entitled "Notice of Names of Persons Appearing to Be Owners of Abandoned Property" and shall contain:

(a) the names in alphabetical order and last known addresses, if any, or person listed in the report and entitled to notice within the county as hereinbefore specified;

(b) a statement that information concerning the amount or description of the property and the name and address of the holder may be obtained by any persons possessing an interest in the property by addressing an inquiry to the department;

(c) a statement that if proof of claim is not presented by the owner to the holder and if the owner's right to receive the property is not established to the holder's satisfaction within 65 days from the date of the second published notice, the abandoned property will be placed not later than 85 days after such publication date in the custody of the department to whom all further claims must thereafter be directed.

(3) The department is not required to publish in such notice any item of less than $25 unless the department deems such publication to be in the public interest.

(4) Within 120 days from the receipt of the report required by 70-9-301, the department shall mail a notice to each person having an address listed therein who appears to be entitled to property of the value of $25 or more presumed abandoned under parts 1 through 3.

(5) The mailed notice shall contain:

(a) a statement that, according to a report filed with the department, property is being held to which the addressee appears entitled;

(b) the name and address of the person holding the property and any necessary information regarding changes of name and address of the holder;

(c) a statement that if satisfactory proof of claim is not presented by the owner to the holder by the date specified in the published notice, the property will be placed in the custody of the department to whom all further claims must be directed.

(6) This section is not applicable to sums payable on travelers' checks or money orders presumed abandoned under 70-9-201.

**History: En. Sec. 12, Ch. 244, L. 1963; amd. Sec. 3, Ch. 226, L. 1967; amd. Sec. 2, Ch. 216, L. 1971; amd. Sec. 25, Ch. 391, L. 1973; R.C.M. 1947, 67-2212.**

**70-9-303. Payment or delivery of abandoned property to department.** Every person who has filed a report as provided by 70-9-301 shall, within 20 days after the time specified in 70-9-302 for claiming the property from the holder or, in the case of sums payable on travelers' checks or money orders presumed abandoned under 70-9-201, within 20 days after the filing of the report, pay or deliver to the department of revenue all abandoned property specified in this report, except that if the owner establishes his right to receive the abandoned property to the satisfaction of the holder within the time specified in 70-9-302 or if it appears that for some other reason the presumption of abandonment is erroneous, the holder need not pay or deliver the property, which will no longer be presumed abandoned, to the department but in lieu thereof shall file a verified written explanation of the proof of claim or of the error in the presumption of abandonment.

**History: En. Sec. 13, Ch. 244, L. 1963; amd. Sec. 4, Ch. 226, L. 1967; amd. Sec. 3, Ch. 216, L. 1971; amd. Sec. 26, Ch. 391, L. 1973; R.C.M. 1947, 67-2213.**

**70-9-304. Relief from liability by payment or delivery to department.** (1) Upon the payment or delivery of abandoned property to the department of revenue, the state shall assume custody and shall be responsible for the safekeeping thereof.

(2) Any person who pays or delivers abandoned property to the department under parts 1 through 3 is relieved of all liability to the extent of the value of the property so paid or delivered for any claim which then exists or which thereafter may arise or be made in respect to the property.

**History: En. Sec. 14, Ch. 244, L. 1963; amd. Sec. 4, Ch. 216, L. 1971; amd. Sec. 27, Ch. 391, L. 1973; R.C.M. 1947, 67-2214(part).**

**70-9-305. Reimbursement to holder for payment to owner or other state.** (1) Any holder who has paid moneys to the department of revenue pursuant to parts 1 through 3 may make payment to any person appearing to such holder to be entitled thereto, and upon proof of such payment and proof that the payee was entitled thereto, the department shall forthwith reimburse the holder for the payment.

(2) Any holder who has paid moneys to the department pursuant to parts 1 through 3 and after exhausting his legal remedies is compelled by authority of another jurisdiction to make a second payment to any other state, upon certified proof thereof and upon proof that the department was notified in writing of the claim of such other state within 30 days after such claim has been asserted, the department shall refund to such holder the amount of such second payment not in excess of the amount paid to the department under parts 1 through 3.

**History: En. Sec. 14, Ch. 244, L. 1963; amd. Sec. 4, Ch. 216, L. 1971; amd. Sec. 27, Ch. 391, L. 1973; R.C.M. 1947, 67-2214(part).**

**70-9-306. Income accruing after payment or delivery to department.** When property is paid or delivered to the department of revenue under parts 1 through 3, the owner is not entitled to receive income or other increments accruing thereafter.

**History: En. Sec. 15, Ch. 244, L. 1963; amd. Sec. 5, Ch. 216, L. 1971; amd. Sec. 28, Ch. 391, L. 1973; R.C.M. 1947, 67-2215.**

**70-9-307. Period of limitations not to prevent presumption or affect duties.** The expiration of any period of time specified by statute or court order during which an action or proceeding may be commenced or enforced to obtain payment of a claim for money or recovery of property shall not prevent the money or property from being presumed abandoned property or affect any duty to file a report required by parts 1 through 3 or to pay or deliver abandoned property to the department of revenue.

**History: En. Sec. 16, Ch. 244, L. 1963; amd. Sec. 6, Ch. 216, L. 1971; amd. Sec. 29, Ch. 391, L. 1973; R.C.M. 1947, 67-2216.**

**70-9-308. Sale of abandoned property — notice — title of purchaser.** (1) All abandoned property other than money delivered to the department of revenue under parts 1 through 3 shall within 1 year after the delivery be sold by the department to the highest bidder at public sale in whatever city in the state affords in the department's judgment the most favorable market for the property involved. The department may decline highest bid and reoffer the property for sale if the department considers the price bid insufficient. The department need not offer any property for sale if, in the department's opinion, the probable cost of sale exceeds the value of the property.

(2) Any sale held under this section shall be preceded by a single publication of notice thereof at least 3 weeks in advance of sale in an English language newspaper of general circulation in the county where the property is to be sold.

(3) The purchaser at any sale conducted by the department pursuant to parts 1 through 3 shall receive title to the property purchased free from all claims of the owner or prior holder thereof and of all persons claiming through or under them. The department shall execute all documents necessary to complete the transfer of title.

**History: En. Sec. 17, Ch. 244, L. 1963; amd. Sec. 7, Ch. 216, L. 1971; amd. Sec. 30, Ch. 391, L. 1973; R.C.M. 1947, 67-2217.**

**70-9-309. Deposit of moneys — record — deduction of costs.** (1) All moneys received under parts 1 through 3, including the proceeds from the sale of abandoned property under 70-9-308, shall forthwith be deposited by the department of revenue with the state treasurer for credit to the trust and legacy fund, public school account of the state, except that the state treasurer shall retain in the agency fund an amount not exceeding $25,000 from which he shall make prompt payment of claims allowed by the department as hereinafter provided.

(2) Before making the deposit the department shall record the name and last known address of each person appearing from the holders' reports to be entitled to the abandoned property and of the name and last known address of each insured person or annuitant and, with respect to each policy or contract listed in the report of a life insurance corporation, its number, the name of the corporation, and the amount due. The record shall be available for public inspection at all reasonable business hours.

(3) Before making any deposit to the credit of the public school account, the department may deduct:

(a) any costs in connection with sale of abandoned property;

(b) any costs of mailing and publication in connection with any abandoned property; and

(c) reasonable service charges.

**History: En. Sec. 18, Ch. 244, L. 1963; amd. Sec. 8, Ch. 216, L. 1971; amd. Sec. 31, Ch. 391, L. 1973; R.C.M. 1947, 67-2218.**

**70-9-310. Claim for property paid or delivered — filing.** Any person claiming an interest in any property delivered to the state under parts 1 through 3 may file a claim thereto or to the proceeds from the sale thereof on the form prescribed by the department of revenue, except that no claim for less than $10 may be filed.

**History: En. Sec. 19, Ch. 244, L. 1963; amd. Sec. 9, Ch. 216, L. 1971; amd. Sec. 32, Ch. 391, L. 1973; amd. Sec. 2, Ch. 195, L. 1977; R.C.M. 1947, 67-2219.**

**70-9-311. Determination and payment of claim.** (1) The department of revenue shall consider any claim filed under parts 1 through 3 and issue a written determination of the claim.

(2) An aggrieved claimant may appeal to the state tax appeal board, which shall hold a hearing and receive evidence concerning the claim. If a hearing is held, the board shall prepare a finding and a decision in writing on each claim filed, stating the substance of any evidence heard by the board and the reasons for the board's decision. The decision shall be a public record.

(3) If the claim is allowed, the department shall make payment forthwith. The claim shall be paid without deduction for costs of notices or sale or for service charges.

**History: En. Sec. 20, Ch. 244, L. 1963; amd. Sec. 10, Ch. 216, L. 1971; amd. Sec. 33, Ch. 391, L. 1973; amd. Sec. 9, Ch. 155, L. 1977; R.C.M. 1947, 67-2220.**

**70-9-312. Appeal to court from decision of tax board — trial de novo.** Any person aggrieved by a decision of the state tax appeal board or as to whose claim the board has failed to act within 90 days after the filing of the claim may commence an action in the district court of Lewis and Clark County to establish his claim. The proceeding shall be brought within 90 days after the decision of the state tax appeal board or within 180 days from the filing of the claim if the board fails to act. The action shall be tried de novo without a jury.

**History: En. Sec. 21, Ch. 244, L. 1963; amd. Sec. 11, Ch. 216, L. 1971; amd. Sec. 34, Ch. 391, L. 1973; amd. Sec. 10, Ch. 155, L. 1977; R.C.M. 1947, 67-2221.**

**70-9-313. Prerogative of department to decline receipt of property.** The department of revenue, after receiving reports of property deemed abandoned pursuant to parts 1 through 3, may decline to receive any property reported which the department deems to have a value less than the cost of giving notice and holding sale or the department may, if the department deems it desirable because of the small sum involved, postpone taking possession until a sufficient sum accumulates.

**History: En. Sec. 22, Ch. 244, L. 1963; amd. Sec. 12, Ch. 216, L. 1971; amd. Sec. 35, Ch. 391, L. 1973; R.C.M. 1947, 67-2222.**

**70-9-314. Examination of records for failure to report.** The department of revenue or its designated agent may at reasonable times and upon reasonable notice examine the records of any person if the department has reason to believe that such person has failed to report property that should have been reported pursuant to parts 1 through 3.

**History: En. Sec. 23, Ch. 244, L. 1963; amd. Sec. 13, Ch. 216, L. 1971; amd. Sec. 36, Ch. 391, L. 1973; R.C.M. 1947, 67-2223.**

**70-9-315. Proceeding to compel delivery of property.** If any person refuses to deliver property to the department of revenue as required under parts 1 through 3, the department shall bring an action in a court of appropriate jurisdiction to enforce such delivery.

**History: En. Sec. 24, Ch. 244, L. 1963; amd. Sec. 14, Ch. 216, L. 1971; amd. Sec. 37, Ch. 391, L. 1973; R.C.M. 1947, 67-2224.**

**70-9-316. Penalties.** (1) Any person who willfully fails to render any report or perform other duties required under parts 1 through 3 shall be punished by a fine of $50 for each day such report is withheld but not more than $1,000.

(2) Any person who willfully refuses to pay or deliver abandoned property to the department of revenue as required under parts 1 through 3 shall be punished by a fine of not less than $100 or more than $1,000 or imprisonment for not more than 6 months, or both, in the discretion of the court.

**History: En. Sec. 25, Ch. 244, L. 1963; amd. Sec. 15, Ch. 216, L. 1971; amd. Sec. 38, Ch. 391, L. 1973; R.C.M. 1947, 67-2225.**

## Part 4

## Common Carriers, Commission Merchants, and Warehousemen

**70-9-401. Applicability — Uniform Commercial Code.** The provisions of this part apply only to the extent not otherwise provided for in the Uniform Commercial Code.

**History: En. 20-314 by Sec. 11-116, Ch. 264, L. 1963; R.C.M. 1947, 20-314.**

**70-9-402. Storage of unclaimed property.** When any goods, merchandise, or other property has been received by any railroad or express company or other common carrier, commission merchants, or warehousemen for transportation or safekeeping and are not delivered to the owner, consignee, or other authorized person, the carrier, commission merchant, or warehouseman may hold or store the same with some responsible person until the freight and all just and reasonable charges are paid.

**History: En. Sec. 2920, Pol. C. 1895; re-en. Sec. 2003, Rev. C. 1907; re-en. Sec. 7667, R.C.M. 1921; Cal. Pol. C. Sec. 3152; re-en. Sec. 7667, R.C.M. 1935; R.C.M. 1947, 20-308.**

**70-9-403. Property unclaimed within 90 days to be sold — notice — surplus.** (1) If no person calls for the property within 90 days from the receipt thereof and pays freight and charges thereon, the carrier, commission merchant, or warehouseman may sell such property or so much thereof, at auction to the highest bidder, as will pay freight and charges, first having given 20 days' notice of the time and place of sale to the owner, consignee, or consignor, when known, and by advertisement in a daily paper 10 days (or if in a weekly paper, 4 weeks), published where such sale is to take place.

(2) If any surplus is left after paying freight, storage, cost of advertising, and other reasonable charges, the same must be paid over to the owner of such property at any time thereafter, upon demand being made therefor or within 60 days after the sale.

**History: En. Sec. 2921, Pol. C. 1895; re-en. Sec. 2004, Rev. C. 1907; re-en. Sec. 7668, R.C.M. 1921; Cal. Pol. C. Sec. 3153; re-en. Sec. 7668, R.C.M. 1935; R.C.M. 1947, 20-309.**

**70-9-404. Surplus proceeds unclaimed — disposition.** If the owner or his agent fails to demand such surplus within 60 days of the time of such sale, then it must be paid into the county treasury, subject to the order of the owner.

**History: En. Sec. 2922, Pol. C. 1895; re-en. Sec. 2005, Rev. C. 1907; re-en. Sec. 7669, R.C.M. 1921; Cal. Pol. C. Sec. 3154; re-en. Sec. 7669, R.C.M. 1935; R.C.M. 1947, 20-310.**

**70-9-405. Responsibility of carrier and bailee after storage.** After the storage of goods, merchandise, or property as provided in this part, the responsibility of the carrier ceases, nor is the person with whom the same is stored liable for any loss or damage on account thereof unless the same results from his negligence or want of proper care.

**History: En. Sec. 2923, Pol. C. 1895; re-en. Sec. 2006, Rev. C. 1907; re-en. Sec. 7670, R.C.M. 1921; Cal. Pol. Sec. 3155; re-en. Sec. 7670, R.C.M. 1935; R.C.M. 1947, 20-311.**

**70-9-406. Sale of property upon which advances are due.** When any commission merchant or warehouseman receives on consignment produce, merchandise, or other property and makes advances thereon, either to the owner or for freight and charges, he may, if the same is not paid to him within 90 days from the date of such advances, cause the produce, merchandise, or property on which the advances were made to be advertised and sold as provided in this part.

**History: En. Sec. 2924, Pol. C. 1895; re-en. Sec. 2007, Rev. C. 1907; re-en. Sec. 7671, R.C.M. 1921; Cal. Pol. C. Sec. 3156; re-en. Sec. 7671, R.C.M. 1935; R.C.M. 1947, 20-312.**

**70-9-407. Fees of officers.** The fees of officers under this part are the same as allowed for similar services in other cases provided in this code to be paid by the taker-up or finder and recovered of the owner.

**History: En. Sec. 2925, Pol. C. 1895; re-en. Sec. 2008, Rev. C. 1907; re-en. Sec. 7672, R.C.M. 1921; Cal. Pol. C. Sec. 3157; re-en. Sec. 7672, R.C.M. 1935; R.C.M. 1947, 20-313.**

## Part 5

## Innkeepers

**70-9-501. Sale of unclaimed baggage — notice.** (1) Whenever any trunk, carpetbag, valise, box, bundle, or other baggage comes into the possession of the keeper of any hotel, inn, boardinghouse, or lodginghouse, as such, and remains unclaimed for the period of 6 months, such keeper may proceed to sell the same at public auction and out of the proceeds of such sale may retain the charges for storage, if any, and the expense of advertising and sale thereof.

(2) But no such sale shall be made until the expiration of 4 weeks from the first publication of notice of such sale in a newspaper published in or nearest the city, town, or place in which said hotel, inn, boardinghouse, or lodginghouse is situated.

(3) Said notice shall be published once a week for 4 successive weeks in some newspaper, daily or weekly, of general circulation and shall contain:

(a) a description of each trunk, carpetbag, valise, box, bundle, or other baggage, as near as may be;

(b) the name of the owner, if known;

(c) the name of said keeper and the time and place of sale.

(4) The expenses incurred for advertising shall be a lien upon such trunk, carpetbag, valise, box, bundle, or other baggage, in a ratable proportion, according to the value of such piece of property or thing or article sold.

**History: En. Sec. 2503, Civ. C. 1895; re-en. Sec. 5167, Rev. C. 1907; re-en. Sec. 7676, R.C.M. 1921; Cal. Civ. C. Sec. 1862; re-en. Sec. 7676, R.C.M. 1935; R.C.M. 1947, 34-104(part).**

**70-9-502. Disposition of surplus proceeds.** In case any balance arising from such sale shall not be claimed by the rightful owner within 1 week from the day of said sale, the same shall be paid into the treasury of the county in which such sale took place, and if the same be not claimed by the owner thereof or his legal representatives within 1 year thereafter, the same shall be paid into the general fund of said county.

**History: En. Sec. 2503, Civ. C. 1895; re-en. Sec. 5167, Rev. C. 1907; re-en. Sec. 7676, R.C.M. 1921; Cal. Civ. C. Sec. 1862; re-en. Sec. 7676, R.C.M. 1935; R.C.M. 1947, 34-104(part).**

# CHAPTERS 10 THROUGH 14

## RESERVED

# CHAPTER 15

## DEFINITIONS AND KINDS OF ESTATES IN REAL PROPERTY

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Section

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### Part 1

### Real Property Defined Fixtures and Appurtenances

**70-15-101. Real property defined.** Real or immovable property consists of:
(1) land;
(2) that which is affixed to land;

(3) that which is incidental or appurtenant to land;
(4) that which is immovable by law.

**History: En. Sec. 1074, Civ. C. 1895; re-en. Sec. 4425, Rev. C. 1907; re-en. Sec. 6667, R.C.M. 1921; Cal. Civ. C. Sec. 658; Based on Field Civ. C. Sec. 163; re-en. Sec. 6667, R.C.M. 1935; R.C.M. 1947, 67-207.**

**70-15-102. Land defined.** Land is the solid material of the earth, whatever may be the ingredients of which it is composed, whether soil, rock, or other substance.

**History: En. Sec. 1075, Civ. C. 1895; re-en. Sec. 4426, Rev. C. 1907; re-en. Sec. 6668, R.C.M. 1921; Cal. Civ. C. Sec. 659; Field Civ. C. Sec. 164; re-en. Sec. 6668, R.C.M. 1935; R.C.M. 1947, 67-208.**

**70-15-103. Fixture defined.** A thing is deemed to be affixed to land when it is:
(1) attached to it by roots, as in the case of trees, vines, or shrubs;
(2) imbedded in it, as in the case of walls;
(3) permanently resting upon it, as in the case of buildings; or
(4) permanently attached to what is thus permanent as by means of cement, plaster, nails, bolts, or screws.

**History: En. Sec. 1076, Civ. C. 1895; re-en. Sec. 4427, Rev. C. 1907; re-en. Sec. 6669, R.C.M. 1921; Cal. Civ. C. Sec. 660; Field Civ. C. Sec. 165; re-en. Sec. 6669, R.C.M. 1935; R.C.M. 1947, 67-209.**

**70-15-104. Fixtures attached to mines.** Sluice boxes, flumes, hose, pipes, railway tracks, cars, blacksmith shops, mills, and all other machinery or tools used in working or developing a mine are to be deemed affixed to the mine.

**History: En. Sec. 1077, Civ. C. 1895; re-en. Sec. 4428, Rev. C. 1907; re-en. Sec. 6670, R.C.M. 1921; Cal. Civ. C. Sec. 661; re-en. Sec. 6670, R.C.M. 1935; R.C.M. 1947, 67-210.**

**70-15-105. Incident or appurtenance defined.** A thing is deemed to be incidental or appurtenant to land when it is by right used with the land for its benefit, as in the case of a way or watercourse or of a passage for light, air, or heat from or across the land of another.

**History: En. Sec. 1078, Civ. C. 1895; re-en. Sec. 4429, Rev. C. 1907; re-en. Sec. 6671, R.C.M. 1921; Cal. Civ. C. Sec. 662; Field Civ. C. Sec. 166; re-en. Sec. 6671, R.C.M. 1935; R.C.M. 1947, 67-211.**

## Part 2

## Classification of Interests in Real Property

**70-15-201. Application of classifications.** The names and classification of interests in real property have only such application to interests in personal property as is in this code expressly provided.

**History: En. Sec. 1123, Civ. C. 1895; re-en. Sec. 4456, Rev. C. 1907; re-en. Sec. 6698, R.C.M. 1921; Cal. Civ. C. Sec. 702; Field Civ. C. Sec. 194; re-en. Sec. 6698, R.C.M. 1935; R.C.M. 1947, 67-328.**

**70-15-202. Enumeration of estates.** Estates in real property, in respect to the duration of their enjoyment, are either:

(1) estates of inheritance or perpetual estates;

(2) estates for life;

(3) estates for years;

(4) estates from year to year, quarter to quarter, month to month, week to week, day to day, and for other indefinite and unascertained durations of enjoyment whatsoever, except estates or tenancies at will; or

(5) estates at will.

**History: En. Sec. 1210, Civ. C. 1895; re-en. Sec. 4481, Rev. C. 1907; re-en. Sec. 6723, R.C.M. 1921; Cal. Civ. C. Sec. 761; Field Civ. C. Sec. 218; amd. Sec. 1, Ch. 48, L. 1931; re-en. Sec. 6723, R.C.M. 1935; R.C.M. 1947, 67-502.**

**70-15-203. Fee simple.** Every estate of inheritance is a fee, and such estate, when not defeasible or conditional, is a fee simple or an absolute fee.

**History: En. Sec. 1211, Civ. C. 1895; re-en. Sec. 4482, Rev. C. 1907; re-en. Sec. 6724, R.C.M. 1921; Cal. Civ. C. Sec. 762; Based on Field Civ. Sec. 219; re-en. Sec. 6724, R.C.M. 1935; R.C.M. 1947, 67-503.**

**70-15-204. Estates tail abolished — considered fee simple.** Estates tail are abolished, and every estate which would be at common law adjudged to be a fee tail is a fee simple and, if no valid remainder is limited thereon, is a fee simple absolute.

**History: En. Sec. 1212, Civ. C. 1895; re-en. Sec. 4483, Rev. C. 1907; re-en. Sec. 6725, R.C.M. 1921; Cal. Civ. C. Sec. 763; Based on Field Civ. C. Sec. 220; re-en. Sec. 6725, R.C.M. 1935; R.C.M. 1947, 67-504.**

**70-15-205. Remainder limited upon fee tail valid — vesting.** Where a remainder in fee is limited upon any estate which would by the common law be adjudged a fee tail, such remainder is valid as a contingent limitation upon a fee and vests in possession on the death of the first taker without issue living at the time of his death.

**History: En. Sec. 1213, Civ. C. 1895; re-en. Sec. 4484, Rev. C. 1907; re-en. Sec. 6726, R.C.M. 1921; Cal. Civ. C. Sec. 764; Based on Field Civ. C. Sec. 221; re-en. Sec. 6726, R.C.M. 1935; R.C.M. 1947, 67-505.**

**70-15-206. Freehold estates — chattels real — chattel interests.** Estates of inheritance and for life are called estates of freehold; estates for years and estates embraced by the provisions of 70-15-202(4) are chattels real; and estates at will are chattel interests but are not liable as such to sale on execution.

**History: En. Sec. 1214, Civ. C. 1895; re-en. Sec. 4485, Rev. C. 1907; re-en. Sec. 6727, R.C.M. 1921; Cal. Civ. C. Sec. 765; Field Civ. C. Sec. 222; amd. Sec. 1, Ch. 49, L. 1931; re-en. Sec. 6727, R.C.M. 1935; R.C.M. 1947, 67-506.**

**70-15-207. Estate for life of third person — freehold.** An estate during the life of a third person, whether limited to heirs or otherwise, is a freehold.

**History: En. Sec. 1215, Civ. C. 1895; re-en. Sec. 4486, Rev. C. 1907; re-en. Sec. 6728, R.C.M. 1921; Cal. Civ. C. Sec. 766; re-en. Sec. 6728, R.C.M. 1935; R.C.M. 1947, 67-507.**

**70-15-208. Term of years — suspension of absolute ownership.** The absolute ownership of a term of years cannot be suspended for a longer period than the absolute power of alienation can be suspended in respect to a fee.

**History: En. Sec. 1219, Civ. C. 1895; re-en. Sec. 4490, Rev. C. 1907; re-en. Sec. 6732, R.C.M. 1921; Cal. Civ. C. Sec. 770; re-en. Sec. 6732, R.C.M. 1935; R.C.M. 1947, 67-511.**

**70-15-209. Future estate — right of possession at future day.** A future estate may be limited by the act of the party to commence in possession at a future day, either without the intervention of a precedent estate or on the termination by lapse of time or otherwise of a precedent estate created at the same time.

**History: En. Sec. 1216, Civ. C. 1895; re-en. Sec. 4487, Rev. C. 1907; re-en. Sec. 6729, R.C.M. 1921; Cal. Civ. C. Sec. 767; Field Civ. C. Sec. 224; re-en. Sec. 6729, R.C.M. 1935; R.C.M. 1947, 67-508.**

**70-15-210. Reversion.** A reversion is the residue of an estate left by operation of law in the grantor or his successors or in the successors of a testator, commencing in possession on the determination of a particular estate granted or devised.

**History: En. Sec. 1217, Civ. C. 1895; re-en. Sec. 4488, Rev. C. 1907; re-en. Sec. 6730, R.C.M. 1921; Cal. Civ. C. Sec. 768; Field Civ. C. Sec. 225; re-en. Sec. 6730, R.C.M. 1935; R.C.M. 1947, 67-509.**

**70-15-211. Remainder.** When a future estate, other than a reversion, is dependent on a precedent estate, it may be called a remainder and may be created and transferred by that name.

**History: En. Sec. 1218, Civ. C. 1895; re-en. Sec. 4489, Rev. C. 1907; re-en. Sec. 6731, R.C.M. 1921; Cal. Civ. C. Sec. 769; Field Civ. C. Sec. 226; re-en. Sec. 6731, R.C.M. 1935; R.C.M. 1947, 67-510.**

**70-15-212. Future and contingent estates — how created.** Subject to the rules of parts 1, 3, and 4 of chapter 1, parts 1 and 2 of this chapter, and part 1 of chapter 17:

(1) a freehold estate, as well as a chattel real, may be created to commence at a future day;

(2) an estate for life may be created in a term of years and a remainder limited thereon;

(3) a remainder of a freehold or chattel real, either contingent or vested, may be created, expectant on the determination of a term of years; and

(4) a fee may be limited on a fee upon a contingency which, if it should occur, must happen within the period prescribed in this code.

**History: En. Sec. 1222, Civ. C. 1895; re-en. Sec. 4493, Rev. C. 1907; re-en. Sec. 6735, R.C.M. 1921; Cal. Civ. C. Sec. 773; Field Civ. C. Sec. 230; re-en. Sec. 6735, R.C.M. 1935; R.C.M. 1947, 67-514.**

**70-15-213. Remainder upon a contingency.** A remainder may be limited on a contingency which, in case it should happen, will operate to abridge or determine the precedent estate, and every such remainder is to be deemed a conditional limitation.

**History: En. Sec. 1227, Civ. C. 1895; re-en. Sec. 4498, Rev. C. 1907; re-en. Sec. 6740, R.C.M. 1921; Cal. Civ. C. Sec. 778; Field Civ. C. Sec. 236; re-en. Sec. 6740, R.C.M. 1935; R.C.M. 1947, 67-519.**

**70-15-214. Remainder not upon a contingency — when to take effect.** When a remainder of an estate for life or for years is not limited on a contingency defeating or avoiding such precedent estate, it is to be deemed intended to take effect only on the death of the first taker or the expiration by lapse of time of such term of years.

**History: En. Sec. 1229, Civ. C. 1895; re-en. Sec. 4500, Rev. C. 1907; re-en. Sec. 6742, R.C.M. 1921; Cal. Civ. C. Sec. 780; Field Civ. C. Sec. 238; re-en. Sec. 6742, R.C.M. 1935; R.C.M. 1947, 67-521.**

**70-15-215. Remainder to heirs of tenant for life — effect of.** When a remainder is limited to the heirs or heirs of the body of a person to whom a life estate in the same property is given, the persons who on the termination of the life estate are the successors or heirs of the body of the owner for life are entitled to take by virtue of the remainder so limited to them and not as mere successors of the owner for life.

**History: En. Sec. 1228, Civ. C. 1895; re-en. Sec. 4499, Rev. C. 1907; re-en. Sec. 6741, R.C.M. 1921; Cal. Civ. C. Sec. 779; Field Civ. C. Sec. 237; re-en. Sec. 6741, R.C.M. 1935; R.C.M. 1947, 67-520.**

**70-15-216. When vesting of future estate not prevented by power of appointment.** A general or special power of appointment does not prevent the vesting of a future estate limited to take effect in case such power is not executed.

**History: En. Sec. 1230, Civ. C. 1895; re-en. Sec. 4501, Rev. C. 1907; re-en. Sec. 6743, R.C.M. 1921; Cal. Civ. C. Sec. 781; Field Civ. C. Sec. 239; re-en. Sec. 6743, R.C.M. 1935; R.C.M. 1947, 67-522.**

## Part 3

## Powers

**70-15-301. Power defined.** A "power", as the term is used in this part, is an authority to do some act in relation to real property or to the creation or revocation of an estate therein or a charge thereon, which the owner granting or reserving such power might himself perform for any purpose.

**History: En. Sec. 1330, Civ. C. 1895; re-en. Sec. 4551, Rev. C. 1907; re-en. Sec. 6798, R.C.M. 1921; Field Civ. C. Sec. 302; re-en. Sec. 6798, R.C.M. 1935; R.C.M. 1947, 67-901.**

**70-15-302. Who may not execute power.** A power cannot be executed by any person not capable of disposing of real property.

**History: En. Sec. 1331, Civ. C. 1895; re-en. Sec. 4552, Rev. C. 1907; re-en. Sec. 6799, R.C.M. 1921; Field Civ. C. Sec. 319; re-en. Sec. 6799, R.C.M. 1935; R.C.M. 1947, 67-902.**

**70-15-303. Married persons — execution.** (1) A married person may execute a power during marriage without the concurrence of the spouse unless otherwise prescribed by the terms of the power.

(2) No power can be executed by a married woman before she attains her majority which could not be executed by a married man before he attains his majority.

**History: (1)En. Sec. 1332, Civ. C. 1895; re-en. Sec. 4553, Rev. C. 1907; re-en. Sec. 6800, R.C.M. 1921; Field Civ. C. Sec. 320; re-en. Sec. 6800, R.C.M. 1935; amd. Sec. 31, Ch. 535, L. 1975; Sec. 67-903, R.C.M. 1947; (2)En. Sec. 1333, Civ. C. 1895; re-en. Sec. 4554, Rev. C. 1907; re-en. Sec. 6801, R.C.M. 1921; Based on Field Civ. C. Sec. 321; re-en. Sec. 6801, R.C.M. 1935; amd. Sec. 32, Ch. 535, L. 1975; Sec. 67-904, R.C.M. 1947; R.C.M. 1947, 67-903, 67-904.**

**70-15-304. Power — how executed.** A power can be executed only by a written instrument which would be sufficient to pass the estate or interest intended to pass under the power if the person executing the power were the actual owner.

**History: En. Sec. 1334, Civ. C. 1895; re-en. Sec. 4555, Rev. C. 1907; re-en. Sec. 6802, R.C.M. 1921; Field Civ. C. Sec. 322; re-en. Sec. 6802, R.C.M. 1935; R.C.M. 1947, 67-905.**

# CHAPTER 16

# RIGHTS AND OBLIGATIONS INCIDENTAL TO OWNERSHIP IN REAL PROPERTY

### Part 1 — General Provisions

Section
70-16-101. Rights of owner in fee — above and below surface.
70-16-102. Rights of life tenant.
70-16-103. Duties of life tenant.
70-16-104. Rights of tenant for years or at will.
70-16-105. Remedy of remainderman or reversioner.
70-16-106. Action for waste — treble damages.
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70-16-108. Injury to timber — exceptions as to treble damages.
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### Part 2 — Adjoining Landowners and Boundaries—Fences

70-16-201. Owner of land bounded by water.
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70-16-203. Adjoining owner's right to lateral and subjacent support — excavations.
70-16-204. Trees on or near boundary.
70-16-205. Monuments and fences — mutual obligation of adjoining owners.
70-16-206. Partition fences required — adjoining lands previously enclosed.
70-16-207. Occupant of land adjoining enclosure of another — when required to share expense of partition fence.
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70-16-209. Repair or rebuilding of partition fences.
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### Part 3 — Gratuitous Licensee for Recreation

70-16-301. Recreational purposes defined.
70-16-302. Restriction on liability to licensee.

### Part 4 — Right of Reentry

70-16-401. Reentry — when and how to be made.
70-16-402. Action for possession under right of reentry — notice not required.

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## Part 1

## General Provisions

**70-16-101. Rights of owner in fee — above and below surface.** The owner of land in fee has the right to the surface and to everything permanently situated beneath or above it.

**History: En. Sec. 1290, Civ. C. 1895; re-en. Sec. 4528, Rev. C. 1907; re-en. Sec. 6770, R.C.M. 1921; Cal. Civ. C. Sec. 829; Field Civ. C. Sec. 266; re-en. Sec. 6770, R.C.M. 1935; R.C.M. 1947, 67-711.**

**70-16-102. Rights of life tenant.** The owner of a life estate may use the land in the same manner as the owner of a fee simple, except that he must do no act to the injury of the inheritance.

**History: En. Sec. 1270, Civ. C. 1895; re-en. Sec. 4518, Rev. C. 1907; re-en. Sec. 6760, R.C.M. 1921; Cal. C. Sec. 818; Field Civ. C. Sec. 257; re-en. Sec. 6760, R.C.M. 1935; R.C.M. 1947, 67-701.**

**70-16-103. Duties of life tenant.** The owner of a life estate must keep the buildings and fences in repair from ordinary waste and must pay the taxes and other annual charges and a just proportion of extraordinary assessments benefiting the whole inheritance.

**History: En. Sec. 1300, Civ. C. 1895; re-en. Sec. 4534, Rev. C. 1907; re-en. Sec. 6776, R.C.M. 1921; Cal. Civ. C. Sec. 840; Field Civ. C. Sec. 272; re-en. Sec. 6776, R.C.M. 1935; R.C.M. 1947, 67-801.**

**70-16-104. Rights of tenant for years or at will.** (1) A tenant for years or at will, unless he is a wrongdoer by holding over, may occupy the buildings, take the annual products of the soil, work mines and quarries open at the commencement of his tenancy; and a tenant at will or for an indefinite term may cultivate and harvest the crops growing at the end of his tenancy.

(2) A tenant for years or at will has no other rights to the property than such as are given to him by the agreement or instrument by which his tenancy is acquired or by subsection (1).

**History: (1)En. Sec. 1271, Civ. C. 1895; re-en. Sec. 4519, Rev. C. 1907; re-en. Sec. 6761, R.C.M. 1921; Cal. Civ. C. Sec. 819; Based on Field Civ. C. Sec. 258; re-en. Sec. 6761, R.C.M. 1935; Sec. 67-702, R.C.M. 1947; (2)En. Sec. 1272, Civ. C. 1895; re-en. Sec. 4520, Rev. C. 1907; re-en. Sec. 6762, R.C.M. 1921; Cal. Civ. C. Sec. 820; Field Civ. C. Sec. 259; re-en. Sec. 6762, R.C.M. 1935; Sec. 67-703, R.C.M. 1947; R.C.M. 1947, 67-702, 67-703.**

**70-16-105. Remedy of remainderman or reversioner.** A person having an estate in fee, in remainder or reversion, may maintain an action for any injury done to the inheritance, notwithstanding an intervening estate for life or years and although, after its commission, his estate is transferred and he has no interest in the property at the commencement of the action.

**History: En. Sec. 1278, Civ. C. 1895; re-en. Sec. 4526, Rev. C. 1907; re-en. Sec. 6768, R.C.M. 1921; Cal. Civ. C. Sec. 826; Field Civ. C. Sec. 265; re-en. Sec. 6768, R.C.M. 1935; R.C.M. 1947, 67-709.**

**70-16-106. Action for waste — treble damages.** If a guardian, tenant for life or years, joint tenant, or tenant in common of real property commits waste thereon, any person aggrieved by the waste may bring an action against him therefor, in which action there may be judgment for treble damages.

**History: En. Sec. 229, p. 91, Bannack Stat.; re-en. Sec. 250, p. 187, L. 1867; re-en. Sec. 299, p. 93, Cod. Stat. 1871; re-en. Sec. 350, p. 137, L. 1877; re-en. Sec. 350, 1st Div. Rev. Stat. 1879; re-en. Sec. 362, 1st Div. Comp. Stat. 1887; re-en. Sec. 1301, C. Civ. Proc. 1895; re-en. Sec. 6866, Rev. C. 1907; re-en. Sec. 9475, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 732; re-en. Sec. 9475, R.C.M. 1935; R.C.M. 1947, 93-6102.**

**70-16-107. Trespass for taking timber.** (1) Any person who cuts down or carries off any wood or underwood, tree, or timber or girdles or otherwise injures any tree or timber on the land of another person or on the street or highway in front of any person's house, village or city lot, or cultivated grounds or on the commons or public grounds of any city or town or on the street or highway in front thereof, without lawful authority, is liable to the owner of such land or to such city or town for treble the amount of damages which may be assessed therefor in a civil action in any court having jurisdiction.

(2) Nothing in subsection (1) authorizes the recovery of more than the just value of the timber taken from uncultivated woodland for the repair of a public highway or bridge upon the land or adjoining it.

**History: (1)En. Sec. 230, p. 91, Bannack Stat.; re-en. Sec. 251, p. 187, L. 1867; re-en. Sec. 300, p. 93, Cod. Stat. 1871; re-en. Sec. 351, p. 137, L. 1877; re-en. Sec. 351, 1st Div. Rev. Stat. 1879; re-en. Sec. 363, 1st Div. Comp. Stat. 1887; re-en. Sec. 1302, C. Civ. Proc. 1895; re-en. Sec. 6867, Rev. C. 1907; re-en. Sec. 9476, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 733; re-en. Sec. 9476, R.C.M. 1935; Sec. 93-6103, R.C.M. 1947; (2)En. Sec. 231, p. 91, Bannack Stat.; re-en. Sec. 252, p. 187, L. 1867; re-en. Sec. 301, p. 93, Cod. Stat. 1871; re-en. Sec. 352, p. 137, L. 1877; re-en. Sec. 352, 1st Div. Rev. Stat. 1879; re-en. Sec. 364, 1st Div. Comp. Stat. 1887; re-en. Sec. 1303, C. Civ. Proc. 1895; re-en. Sec. 6868, Rev. C. 1907; re-en. Sec. 9477, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 734; re-en. Sec. 9477, R.C.M. 1935; Sec. 93-6104, R.C.M. 1947; R.C.M. 1947, 93-6103, 93-6104.**

**70-16-108. Injury to timber — exceptions as to treble damages.** For wrongful injuries to timber, trees, or underwood upon the land of another or removal thereof, the measure of damage is three times such a sum as would compensate for the actual detriment, except where the trespass was casual and involuntary or committed under the belief that the land belonged to the trespasser or where the wood was taken by the authority of highway officers for the purposes of a highway, in which cases the damages are a sum equal to the actual detriment.

**History: En. Sec. 4352, Civ. C. 1895; re-en. Sec. 6078, Rev. C. 1907; re-en. Sec. 8696, R.C.M. 1921; Cal. Civ. C. Sec. 3346; Field. Civ. C. Sec. 1871; re-en. Sec. 8696, R.C.M. 1935; R.C.M. 1947, 17-503.**

**70-16-109. Summary proceedings for possession — where provisions found.** Summary proceedings for obtaining possession of real property forcibly entered or forcibly and unlawfully detained are provided for in chapter 27.

**History: En. Sec. 1243, Civ. C. 1895; re-en. Sec. 4505, Rev. C. 1907; re-en. Sec. 6747, R.C.M. 1921; Cal. Civ. C. Sec. 792; re-en. Sec. 6747, R.C.M. 1935; R.C.M. 1947, 67-526.**

## Part 2

## Adjoining Landowners and Boundaries — Fences

**70-16-201. Owner of land bounded by water.** Except where the grant under which the land is held indicates a different intent, the owner of the land, when it borders upon a navigable lake or stream, takes to the edge of the lake or stream at low-water mark; when it borders upon any other water, the owner takes to the middle of the lake or stream.

**History: En. Sec. 1291, Civ. C. 1895; re-en. Sec. 4529, Rev. C. 1907; re-en. Sec. 6771, R.C.M. 1921; Cal. Civ. C. Sec. 830; Based on Field Civ. C. Sec. 267; re-en. Sec. 6771, R.C.M. 1935; R.C.M. 1947, 67-712.**

**70-16-202. Owner of land bounded by road.** An owner of land bounded by a road or street is presumed to own to the center thereof, but the contrary may be shown.

**History: En. Sec. 1292, Civ. C. 1895; re-en. Sec. 4530, Rev. C. 1907; re-en. Sec. 6772, R.C.M. 1921; Cal. Civ. C. Sec. 831; Field Civ. C. Sec. 268; re-en. Sec. 6772, R.C.M. 1935; R.C.M. 1947, 67-713.**

**70-16-203. Adjoining owner's right to lateral and subjacent support — excavations.** Each coterminous owner is entitled to the lateral and subjacent support which his land receives from the adjoining land, subject to the right of the owner of the adjoining land to make proper and usual excavations on the same for the purposes of construction, on using ordinary care and skill and taking reasonable precautions to sustain the land of the other and giving previous reasonable notice to the other of his intention to make such excavations.

**History: En. Sec. 1293, Civ. C. 1895; re-en. Sec. 4531, Rev. C. 1907; re-en. Sec. 6773, R.C.M. 1921; Cal. Civ. C. Sec. 832; Based on Field Civ. C. Sec. 269; re-en. Sec. 6773, R.C.M. 1935; R.C.M. 1947, 67-714.**

**70-16-204. Trees on or near boundary.** (1) Trees whose trunks stand partly on the land of two or more coterminous owners belong to them in common.

(2) Trees whose trunks stand wholly upon the land of one owner belong exclusively to him, although their roots grow into the land of another.

**History: En. Secs. 1294, 1295, Civ. C. 1895; re-en. Secs. 4532, 4533, Rev. C. 1907; re-en. Secs. 6774, 6775, R.C.M. 1921; Cal. Civ. C. Secs. 833, 834; Field Civ. C. Secs. 270, 271; re-en. Secs. 6774, 6775, R.C.M. 1935; R.C.M. 1947, 67-715, 67-716.**

**70-16-205. Monuments and fences — mutual obligation of adjoining owners.** Coterminous owners are mutually bound equally to maintain:

(1) the boundaries and monuments between them;

(2) the fences between them, unless one of them chooses to let his land lie without fencing, in which case if he afterwards encloses it, he must refund to the other a just proportion of the value, at that time, of any division fence made by the latter. However, using land for grazing or pasturage of any kind whatsoever shall be deemed a usage of said land, and such land shall not be considered as lying idle under the provisions of this section.

**History: En. Sec. 1301, Civ. C. 1895; re-en. Sec. 4535, Rev. C. 1907; amd. Sec. 1, Ch. 132, L. 1917; re-en. Sec. 6777, R.C.M. 1921; Cal. Civ. C. Sec. 841; Based on Field Civ. C. Sec. 273; re-en. Sec. 6777, R.C.M. 1935; R.C.M. 1947, 67-802.**

**70-16-206. Partition fences required — adjoining lands previously enclosed.** The occupants of adjoining lands enclosed with fences must build and maintain partition fences between their own and the next adjoining enclosure in equal shares so long as both continue to enclose the same, and such partition fence must be kept in good repair throughout the year unless the occupants otherwise mutually agree.

**History: En. Sec. 1114, 5th Div. Comp. Stat. 1887; amd. Sec. 3253, Pol. C. 1895; re-en. Sec. 2085, Rev. C. 1907; re-en. Sec. 6778, R.C.M. 1921; re-en. Sec. 6778, R.C.M. 1935; R.C.M. 1947, 67-803.**

**70-16-207. Occupant of land adjoining enclosure of another — when required to share expense of partition fence.** If any occupant of land adjoining the enclosure of another enclose the same, upon the enclosure of such other person, he must within 3 months thereafter build his proportion of such partition fence or refund to the owner thereof an equal proportion of the value, at that time, of any partition fence of such adjoining occupant.

**History: En. Sec. 1115, 5th Div. Comp. Stat. 1887; re-en. Sec. 3254, Pol. C. 1895; re-en. Sec. 2086, Rev. C. 1907; re-en. Sec. 6779, R.C.M. 1921; re-en. Sec. 6779, R.C.M. 1935; R.C.M. 1947, 67-804.**

**70-16-208. Partition fence when common occupancy ceases.** Whenever any lands belonging to different persons in severalty have been enclosed and occupied in common or without a partition fence between them and one of such occupants desires to occupy his part in severalty, the other occupant must, within 6 months after being notified in writing, build and maintain his proportion of such partition fence as may be necessary for that purpose, and in case of neglect or refusal so to do, the person giving such notice may build such fence at the expense of the person so neglecting or refusing, the amount expended to be recovered in an action, together with all damages he may sustain on account of such neglect or refusal.

**History: En. Sec. 1116, 5th Div. Comp. Stat. 1887; re-en. Sec. 3255, Pol. C. 1895; re-en. Sec. 2087, Rev. C. 1907; re-en. Sec. 6780, R.C.M. 1921; re-en. Sec. 6780, R.C.M. 1935; R.C.M. 1947, 67-805.**

**70-16-209. Repair or rebuilding of partition fences.** In case any person neglects or refuses to repair or rebuild any partition fence which by law he ought to build or maintain, the occupant of the adjoining land may, after giving 60 days' notice that a new fence should be erected or 5 days' notice in writing that the repairing of such fence is necessary, build or repair such fence at the expense of the party so neglecting or refusing, the amount so expended to be recovered from him; and the party so neglecting or refusing, after receipt by him of the notice above provided, is liable to the party injured for all damages he may sustain thereby.

**History: En. Sec. 1118, 5th Div. Comp. Stat. 1887; re-en. Sec. 3257, Pol. C. 1895; re-en. Sec. 2089, Rev. C. 1907; re-en. Sec. 6782, R.C.M. 1921; re-en. Sec. 6782, R.C.M. 1935; R.C.M. 1947, 67-807.**

**70-16-210. Removal of partition fence.** If the occupants of adjoining lands build their respective portions of a partition fence and either of them at any time desires to suffer the land occupied by him to lie open, he may, after having given to the occupants of the adjoining land at least 6 months' notice of his intention so to do, remove his proportion of the partition fence unless such adjoining occupant pays or tenders to him the value thereof. If such fence be removed without notice or after payment or tender of the value as aforesaid, the person removing the same is liable to the person injured for all damages he may sustain thereby.

**History: En. Sec. 1117, 5th Div. Comp. Stat. 1887; re-en. Sec. 3256, Pol. C. 1895; re-en. Sec. 2088, Rev. C. 1907; re-en. Sec. 6781, R.C.M. 1921; re-en. Sec. 6781, R.C.M. 1935; R.C.M. 1947, 67-806.**

## Part 3

## Gratuitous Licensee for Recreation

**70-16-301. Recreational purposes defined.** "Recreational purposes", as used herein, shall include hunting, fishing, swimming, boating, water skiing, camping, picnicking, pleasure driving, winter sports, hiking, or other pleasure expeditions.

**History: En. Sec. 2, Ch. 138, L. 1965; R.C.M. 1947, 67-809.**

**70-16-302. Restriction on liability to licensee.** A landowner or tenant who permits, by act or implication, any person to enter upon any property in the possession or under the control of such landowner or tenant for any recreational purpose without accepting a valuable consideration therefor does not by granting such permission extend any assurance that such property is safe for any purpose or confer upon such a person the status of invitee or licensee to whom any duty of care is owed, and such landowner or tenant shall not be liable to such person for any injury to person or property resulting from any act or omission of such landowner or tenant unless such act or omission constitutes willful or wanton misconduct.

**History: En. Sec. 1, Ch. 138, L. 1965; R.C.M. 1947, 67-808.**

## Part 4

## Right of Reentry

**70-16-401. Reentry — when and how to be made.** Whenever the right of reentry is given to the grantor or lessor in any grant or lease or otherwise, such reentry may be made at any time after the right has accrued, upon 3 days' notice, as provided in chapter 27.

**History: En. Sec. 1242, Civ. C. 1895; re-en. Sec. 4504, Rev. C. 1907; re-en. Sec. 6746, R.C.M. 1921; Cal. Civ. C. Sec. 791; Based on Field Civ. C. Sec. 243; re-en. Sec. 6746, R.C.M. 1935; R.C.M. 1947, 67-525.**

**70-16-402. Action for possession under right of reentry — notice not required.** An action for the possession of real property leased or granted with a right of reentry may be maintained at any time in the district court, after the right to reenter has accrued, without the notice prescribed in 70-16-401.

**History: En. Sec. 1244, Civ. C. 1895; re-en. Sec. 4506, Rev. C. 1907; re-en. Sec. 6748, R.C.M. 1921; Cal. Civ. C. Sec. 793; Field Civ. C. Sec. 244; re-en. Sec. 6748, R.C.M. 1935; R.C.M. 1947, 67-527.**

# CHAPTER 17

# SERVITUDES, EASEMENTS, AND COVENANTS RUNNING WITH THE LAND

### Part 1 — Servitudes—Easements

Section
70-17-101. Servitudes attached to land.
70-17-102. Servitudes not attached to land.
70-17-103. Dominant and servient tenement.
70-17-104. Who may grant servitude.
70-17-105. Who may not hold servitude.
70-17-106. Extent of servitude.
70-17-107. Apportionment of burden upon partition of dominant tenement.
70-17-108. Rights of owner of future estate in dominant tenement.
70-17-109. Who may bring action to enforce easement.
70-17-110. Action by owner of servient tenement for possession.
70-17-111. How servitude extinguished.

### Part 2 — Covenants Running With the Land

70-17-201. Nature and effect.
70-17-202. Convenants specified in this part as exclusive.
70-17-203. What convenants run with the land.
70-17-204. Who bound by convenant.

70-17-205. Nonliability for prior or subsequent breach.
70-17-206. Apportionment of burdens and benefits.

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## Part 1

## Servitudes — Easements

**70-17-101. Servitudes attached to land.** The following land burdens or servitudes upon land may be attached to other land as incidents or appurtenances and are then called easements:

(1) the right of pasture;
(2) the right of fishing;
(3) the right of taking game;
(4) the right-of-way;
(5) the right of taking water, wood, minerals, and other things;
(6) the right of transacting business upon land;
(7) the right of conducting lawful sports upon land;
(8) the right of receiving air, light, or heat from or over or discharging the same upon or over land;
(9) the right of receiving water from or discharging the same upon land;
(10) the right of flooding land;
(11) the right of having water flow without diminution or disturbance of any kind;
(12) the right of using a wall as a party wall;
(13) the right of receiving more than natural support from adjacent land or things affixed thereto;
(14) the right of having the whole of a division fence maintained by a coterminous owner;
(15) the right of having public conveyances stopped or of stopping the same on land;
(16) the right of a seat in church;
(17) the right of burial;
(18) the right of conserving open space to preserve park, recreational, historic, aesthetic, cultural, and natural values on or related to land.

**History: En. Sec. 1250, Civ. C. 1895; re-en. Sec. 4507, Rev. C. 1907; re-en. Sec. 6749, R.C.M. 1921; Cal. Civ. C. Sec. 801; Field Civ. C. Sec. 245; re-en. Sec. 6749, R.C.M. 1935; amd. Sec. 16, Ch. 489, L. 1975; R.C.M. 1947, 67-601.**

**70-17-102. Servitudes not attached to land.** The following land burdens or servitudes upon land may be granted and held though not attached to land:

(1) the right of pasture and of fishing and taking game;
(2) the right of a seat in church;
(3) the right of burial;
(4) the right of taking rents and tolls;
(5) the right-of-way;
(6) the right of taking water, wood, minerals, or other things;
(7) the right of conserving open space to preserve park, recreational, historic, aesthetic, cultural, and natural values on or related to land.

**History: En. Sec. 1251, Civ. C. 1895; re-en. Sec. 4508, Rev. C. 1907; re-en. Sec. 6750, R.C.M. 1921; Cal. Civ. C. Sec. 802; Based on Field Civ. C. Sec. 246; re-en. Sec. 6750, R.C.M. 1935; amd. Sec. 17, Ch. 489, L. 1975; R.C.M. 1947, 67-602.**

**70-17-103. Dominant and servient tenement.** The land to which an easement is attached is called the dominant tenement. The land upon which a burden or servitude is held is called the servient tenement.

**History: En. Sec. 1252, Civ. C. 1895; re-en. Sec. 4509, Rev. C. 1907; re-en. Sec. 6751, R.C.M. 1921; Cal. Civ. C. Sec. 803; Field Civ. C. Sec. 247; re-en. Sec. 6751, R.C.M. 1935; R.C.M. 1947, 67-603.**

**70-17-104. Who may grant servitude.** A servitude can be created only by one who has a vested estate in the servient tenement.

**History: En. Sec. 1253, Civ. C. 1895; re-en. Sec. 4510, Rev. C. 1907; re-en. Sec. 6752, R.C.M. 1921; Cal. Civ. C. Sec. 804; Field Civ. C. Sec. 248; re-en. Sec. 6752, R.C.M. 1935; R.C.M. 1947, 67-604.**

**70-17-105. Who may not hold servitude.** A servitude thereon cannot be held by the owner of the servient tenement.

**History: En. Sec. 1254, Civ. C. 1895; re-en. Sec. 4511, Rev. C. 1907; re-en. Sec. 6753, R.C.M. 1921; Cal. Civ. C. Sec. 805; Field Civ. C. Sec. 249; re-en. Sec. 6753, R.C.M. 1935; R.C.M. 1947, 67-605.**

**70-17-106. Extent of servitude.** The extent of a servitude is determined by the terms of the grant or the nature of the enjoyment by which it was acquired.

**History: En. Sec. 1255, Civ. C. 1895; re-en. Sec. 4512, Rev. C. 1907; re-en. Sec. 6754, R.C.M. 1921; Cal. Civ. C. Sec. 806; Field Civ. C. Sec. 250; re-en. Sec. 6754, R.C.M. 1935; R.C.M. 1947, 67-606.**

**70-17-107. Apportionment of burden upon partition of dominant tenement.** In case of partition of the dominant tenement, the burden must be apportioned according to the division of the dominant tenement but not in such a way as to increase the burden upon the servient tenement.

**History: En. Sec. 1256, Civ. C. 1895; re-en. Sec. 4513, Rev. C. 1907; re-en. Sec. 6755, R.C.M. 1921; Cal. Civ. C. Sec. 807; Field Civ. C. Sec. 251; re-en. Sec. 6755, R.C.M. 1935; R.C.M. 1947, 67-607.**

**70-17-108. Rights of owner of future estate in dominant tenement.** The owner of a future estate in a dominant tenement may use easements attached thereto for the purpose of viewing waste, demanding rent, or removing an obstruction to the enjoyment of such easements although such tenement is occupied by a tenant.

**History: En. Sec. 1257, Civ. C. 1895; re-en. Sec. 4514, Rev. C. 1907; re-en. Sec. 6756, R.C.M. 1921; Cal. Civ. C. Sec. 808; Field Civ. C. Sec. 252; re-en. Sec. 6756, R.C.M. 1935; R.C.M. 1947, 67-608.**

**70-17-109. Who may bring action to enforce easement.** The owner of any estate in a dominant tenement or the occupant of such tenement may maintain an action for the enforcement of an easement attached thereto.

**History: En. Sec. 1258, Civ. C. 1895; re-en. Sec. 4515, Rev. C. 1907; re-en. Sec. 6757, R.C.M. 1921; Cal. Civ. C. Sec. 809; Field Civ. C. Sec. 253; re-en. Sec. 6757, R.C.M. 1935; Sec. 67-609, R.C.M. 1947; redes. 62-617 by Sec. 15, Ch. 489, L. 1975; R.C.M. 1947, 62-617.**

**70-17-110. Action by owner of servient tenement for possession.** The owner in fee of a servient tenement may maintain an action for the possession of the land against any one unlawfully possessed thereof though a servitude exists thereon in favor of the public.

**History: En. Sec. 1259, Civ. C. 1895; re-en. Sec. 4516, Rev. C. 1907; re-en. Sec. 6758, R.C.M. 1921; Cal. Civ. C. Sec. 810; Field Civ. C. Sec. 254; re-en. Sec. 6758, R.C.M. 1935; R.C.M. 1947, 67-610.**

**70-17-111. How servitude extinguished.** A servitude is extinguished:

(1) by the vesting of the right to the servitude and the right to the servient tenement in the same person;

(2) by the destruction of the servient tenement;

(3) by the performance of any act upon either tenement by the owner of the servitude or with his assent which is incompatible with its nature or exercise; or

(4) when the servitude was acquired by enjoyment, by disuse thereof by the owner of the servitude for the period prescribed for acquiring title by enjoyment.

**History: En. Sec. 1260, Civ. C. 1895; re-en. Sec. 4517, Rev. C. 1907; re-en. Sec. 6759, R.C.M. 1921; Cal. Civ. C. Sec. 811; Field Civ. C. Sec. 255; re-en. Sec. 6759, R.C.M. 1935; R.C.M. 1947, 67-611.**

## Part 2

## Covenants Running With the Land

**70-17-201. Nature and effect.** Certain covenants contained in grants of estates in real property are appurtenant to such estates and pass with them so as to bind the assigns of the covenantor and to vest in the assigns of the covenantee in the same manner as if they had personally entered into them. Such covenants are said to run with the land.

**History: En. Sec. 1983, Civ. C. 1895; re-en. Sec. 4914, Rev. C. 1907; re-en. Sec. 7416, R.C.M. 1921; Cal. Civ. C. Sec. 1460; Field Civ. C. Sec. 691; re-en. Sec. 7416, R.C.M. 1935; R.C.M. 1947, 58-304.**

**70-17-202. Covenants specified in this part as exclusive.** The only covenants which run with the land are those specified in this part and those which are incidental thereto.

**History: En. Sec. 1984, Civ. C. 1895; re-en. Sec. 4915, Rev. C. 1907; re-en. Sec. 7417, R.C.M. 1921; Cal. Civ. C. Sec. 1461; Field Civ. C. Sec. 692; re-en. Sec. 7417, R.C.M. 1935; R.C.M. 1947, 58-305.**

**70-17-203. What convenants run with the land.** (1) Every covenant contained in a grant of an estate in real property, which is made for the direct benefit of the property or some part of it then in existence, runs with the land.

(2) Subsection (1) includes covenants of warranty, for quiet enjoyment, or for further assurance on the part of the grantor and covenants for the payment of rent or of taxes or assessments upon the land on the part of a grantee.

(3) A covenant for the addition of some new thing to real property or for the direct benefit of some part of the property not then in existence or annexed thereto, when contained in a grant of an estate in such property and made by the covenantor expressly for his assigns or to the assigns of the covenantee, runs with the land so far as the assigns thus mentioned are concerned.

**History: En. Secs. 1985, 1986, 1987, Civ. C. 1895; re-en. Secs. 4916, 4917, 4918, Rev. C. 1907; re-en. Secs. 7418, 7419, 7420, R.C.M. 1921; Cal. Civ. C. Secs. 1462, 1463, 1464; Field Civ. C. Secs. 693, 694, 695; re-en. Secs. 7418, 7419, 7420, R.C.M. 1935; R.C.M. 1947, 58-306, 58-307, 58-308.**

**70-17-204. Who bound by covenant.** A covenant running with the land binds only those who acquire the whole estate of the covenantor in some part of the property.

**History: En. Sec. 1988, Civ. C. 1895; re-en. Sec. 4919, Rev. C. 1907; re-en. Sec. 7421, R.C.M. 1921; Cal. Civ. C. Sec. 1465; Field Civ. C. Sec. 696; re-en. Sec. 7421, R.C.M. 1935; R.C.M. 1947, 58-309.**

**70-17-205. Nonliability for prior or subsequent breach.** No one, merely by reason of having acquired an estate subject to a covenant running with the land, is liable for a breach of the covenant before he acquired the estate or after he has parted with it or ceased to enjoy its benefits.

**History: En. Sec. 1989, Civ. C. 1895; re-en. Sec. 4920, Rev. C. 1907; re-en. Sec. 7422, R.C.M. 1921; Cal. Civ. C. Sec. 1466; Field Civ. C. Sec. 697; re-en. Sec. 7422, R.C.M. 1935; R.C.M. 1947, 58-310.**

**70-17-206. Apportionment of burdens and benefits.** Where several persons holding by several titles are subject to the burden or entitled to the benefits of a covenant running with the land, it must be apportioned among them according to the value of the property subject to it held by them respectively if such value can be ascertained and, if not, then according to their respective interests in point of quantity.

**History: En. Sec. 1990, Civ. C. 1895; re-en. Sec. 4921, Rev. C. 1907; re-en. Sec. 7423, R.C.M. 1921; Cal. Civ. C. Sec. 1467; Field Civ. C. Sec. 698; re-en. Sec. 7423, R.C.M. 1935; R.C.M. 1947, 58-311.**

# CHAPTER 18

## REAL PROPERTY — ACCESSION FIXTURES AND WATERCOURSES

### Part 1 — Fixtures

Section
70-18-101. Fixture attached by other — accession by owner.
70-18-102. Removal of fixture by tenant.

### Part 2 — Watercourses

70-18-201. Alluvion or accretion — increase of bank.
70-18-202. Sudden removal of bank — right of owner to reclaim.
70-18-203. Island formed in navigable stream.
70-18-204. Island formed in nonnavigable stream.
70-18-205. Island formed by division of stream.

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## Part 1

## Fixtures

**70-18-101. Fixture attached by other — accession by owner.** When a person affixes his property to the land of another, without an agreement permitting him to remove it, the thing affixed, except as provided in 70-18-102 and in the Uniform Commercial Code, belongs to the owner of the land unless he chooses to require the former to remove it.

**History: En. Sec. 1400, Civ. C. 1895; re-en. Sec. 4572, Rev. C. 1907; re-en. Sec. 6819, R.C.M. 1921; Cal. Civ. C. Sec. 1013; Based on Field Civ. C. Sec. 442; re-en. Sec. 6819, R.C.M. 1935; amd. Sec. 11-146, Ch. 264, L. 1963; R.C.M. 1947, 67-1301.**

**70-18-102. Removal of fixture by tenant.** A tenant may remove from the demised premises, any time during the continuance of his term, anything affixed thereto for purposes of trade, manufacture, ornament, or domestic use if the removal can be effected without injury to the premises unless the thing has, by the manner in which it is affixed, become an integral part of the premises.

**History: En. Sec. 1406, Civ. C. 1895; re-en. Sec. 4578, Rev. C. 1907; re-en. Sec. 6825, R.C.M. 1921; Cal. Civ. C. Sec. 1019; re-en. Sec. 6825, R.C.M. 1935; R.C.M. 1947, 67-1307.**

## Part 2

## Watercourses

**70-18-201. Alluvion or accretion — increase of bank.** Where from natural causes land forms by imperceptible degrees upon the bank of a river or stream, navigable or not navigable, either by accumulation of material or by the recession of the stream, such land belongs to the owner of the bank, subject to any existing right-of-way over the bank.

**History: En. Sec. 1401, Civ. C. 1895; re-en. Sec. 4573, Rev. C. 1907; re-en. Sec. 6820, R.C.M. 1921; Cal. Civ. C. Sec. 1014; Field Civ. C. Sec. 443; re-en. Sec. 6820, R.C.M. 1935; R.C.M. 1947, 67-1302.**

**70-18-202. Sudden removal of bank — right of owner to reclaim.** If a river or stream, navigable or not navigable, carries away by sudden violence a considerable and distinguishable part of a bank and bears it to the opposite bank or to another part of the same bank, the owner of the part carried away may reclaim it within a year after the owner of the land to which it has been united takes possession thereof.

**History: En. Sec. 1402, Civ. C. 1895; re-en. Sec. 4574, Rev. C. 1907; re-en. Sec. 6821, R.C.M. 1921; Cal. Civ. C. Sec. 1015; Field Civ. C. Sec. 444; re-en. Sec. 6821, R.C.M. 1935; R.C.M. 1947, 67-1303.**

**70-18-203. Island formed in navigable stream.** Islands and accumulations of land formed in the beds of streams which are navigable belong to the state if there is no title or prescription to the contrary.

**History: En. Sec. 1403, Civ. C. 1895; re-en. Sec. 4575, Rev. C. 1907; re-en. Sec. 6822, R.C.M. 1921; Cal. Civ. C. Sec. 1016; Field Civ. C. Sec. 445; re-en. Sec. 6822, R.C.M. 1935; R.C.M. 1947, 67-1304.**

**70-18-204. Island formed in nonnavigable stream.** An island or accumulation of land formed in a stream which is not navigable belongs to the owner of the shore on that side where the island or accumulation is formed or, if not formed on one side only, to the owners of the shore on the two sides, divided by an imaginary line drawn through the middle of the river.

**History: En. Sec. 1404, Civ. C. 1895; re-en. Sec. 4576, Rev. C. 1907; re-en. Sec. 6823, R.C.M. 1921; Cal. Civ. C. Sec. 1017; Field Civ. C. Sec. 446; re-en. Sec. 6823, R.C.M. 1935; R.C.M. 1947, 67-1305.**

**70-18-205. Island formed by division of stream.** If a stream navigable or not navigable, in forming itself a new arm, divides itself and surrounds land belonging to the owner of the shore and thereby forms an island, the island belongs to such owner.

**History: En. Sec. 1405, Civ. C. 1895; re-en. Sec. 4577, Rev. C. 1907; re-en. Sec. 6824, R.C.M. 1921; Cal. Civ. C. Sec. 1018; Field Civ. C. Sec. 447; re-en. Sec. 6824, R.C.M. 1935; R.C.M. 1947, 67-1306.**

# CHAPTER 19

## REAL PROPERTY ACTIONS GENERALLY LIMITATIONS AND ADVERSE POSSESSION

### Part 1 — General Provisions

Section
70-19-101. Action defined.
70-19-102. Action affecting title or possession — filing as constructive notice.
70-19-103. Action for recovery of possession not prejudiced by alienation.

### Part 2 — Actions Relating to Mining Claims

70-19-201. Actions concerning mining claims governed by local rules.
70-19-202. Abuse of property held jointly or in common — action — mining property.
70-19-203. Adverse claims under acts of congress.
70-19-204. Order for inspection or survey.

### Part 3 — Provisions and Limitations Relating to the State of Montana

70-19-301. Application to lands conveyed by state.
70-19-302. Statute of limitations for state actions concerning real property.
70-19-303. Statute of limitations for actions by grantee — joinder of state.
70-19-304. Statute of limitations for action for recovery of property under void conveyance from state.
70-19-305. Certificate of purchase from state or United States prima facie evidence of ownership.

### Part 4 — Limitations and Adverse Possession

70-19-401. Action for recovery — possession within 5 years required.
70-19-402. Action or defense arising out of title to property or profits — possession within 5 years required.
70-19-403. When action on claim by entry must be commenced.
70-19-404. Presumption of possession within prescribed period — adverse possession as exception.
70-19-405. Title by prescription.
70-19-406. Simple occupancy.
70-19-407. Occupancy under claim founded on instrument or judgment — when considered adverse.
70-19-408. Claim founded on instrument or judgment — what considered possession and occupation.
70-19-409. Actual occupancy under claim of title not founded on instrument or judgment — adverse.
70-19-410. Claim of title not founded on instrument or judgment — what considered occupation.
70-19-411. Occupancy and payment of taxes necessary to prove adverse possession.
70-19-412. Relation of landlord and tenant as affecting adverse possession.

70-19-413. Certain disabilities to suspend running of statutory period.
70-19-414. Right of possession not affected by descent cast.

## Part 1

## General Provisions

**70-19-101. Action defined.** The word "action", as used in parts 3 and 4, is to be construed, whenever it is necessary so to do, as including a special proceeding of a civil nature.

**History: En. Sec. 559, C. Civ. Proc. 1895; re-en. Sec. 6476, Rev. C. 1907; re-en. Sec. 9066, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 363; re-en. Sec. 9066, R.C.M. 1935; R.C.M. 1947, 93-2720.**

**70-19-102. Action affecting title or possession — filing as constructive notice.** (1) In an action affecting the title or right of possession of real property or in an action between husband and wife, the plaintiff, at the time of filing the complaint, and the defendant, at the time of filing his answer, when affirmative relief is claimed in such answer, or at any time afterward may file in the office of the clerk and recorder of the county in which the property is situated a notice of the pendency of the action containing the names of the parties and the object of the action or defense and a description of the property in that county affected thereby.

(2) From the time of filing of such notice only shall a purchaser or encumbrancer of the property affected thereby be deemed to have constructive notice of the pendency of the action and only of its pendency against parties designated by their real names.

**History: En. Sec. 27, p. 48, Bannack Stat.; re-en. Sec. 27, p. 139, L. 1867; re-en. Sec. 33, p. 33, Cod. Stat. 1871; amd. Sec. 70, p. 55, L. 1877; re-en. Sec. 70, 1st Div. Rev. Stat. 1879; re-en. Sec. 70, 1st Div. Comp. Stat. 1887; amd. Sec. 634, C. Civ. Proc. 1895; re-en. Sec. 6517, Rev. C. 1907; re-en. Sec. 9109, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 409; re-en. Sec. 9109, R.C.M. 1935; R.C.M. 1947, 93-3005.**

**70-19-103. Action for recovery of possession not prejudiced by alienation.** An action for the recovery of real property against a person in possession cannot be prejudiced by any alienation made by such person, either before or after the commencement of the action.

**History: En. Sec. 241, p. 93, Bannack Stat.; re-en. Sec. 263, p. 188, L. 1867; re-en. Sec. 312, p. 95, L. 1871; re-en. Sec. 362, p. 139, L. 1877; re-en. Sec. 362, 1st Div. Rev. Stat. 1879; re-en. Sec. 374, 1st Div. Comp. Stat. 1887; re-en. Sec. 1320, C. Civ. Proc. 1895; re-en. Sec. 6880, Rev. C. 1907; re-en. Sec. 9498, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 747; re-en. Sec. 9498, R.C.M. 1935; R.C.M. 1947, 93-6222.**

## Part 2

## Actions Relating to Mining Claims

**70-19-201. Actions concerning mining claims governed by local rules.** In actions respecting mining claims, proof must be admitted of the customs, usages, or regulations established and in force at the bar or diggings embracing such claim; and such customs, usages, or regulations, when not in conflict with the laws of this state or the United States, must govern the decision of the action.

**History: En. Sec. 363, p. 139, L. 1877; re-en. Sec. 363, 1st Div. Rev. Stat. 1879; re-en. Sec. 375, 1st Div. Comp. Stat. 1887; amd. Sec. 1321, C. Civ. Proc. 1895; re-en. Sec. 6881, Rev. C. 1907; re-en. Sec. 9499, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 748; re-en. Sec. 9499, R.C.M. 1935; R.C.M. 1947, 93-6223.**

**70-19-202. Abuse of property held jointly or in common — action — mining property.** If any person shall assume and exercise exclusive ownership over or take away, destroy, lessen in value, or otherwise injure or abuse any property held in joint tenancy or tenancy in common, the party aggrieved shall have his action for the injury in the same manner as he would have if such joint tenancy or tenancy in common did not exist; provided that nothing herein contained shall prevent one cotenant or joint tenant or any number of cotenants or joint tenants acting together less than all from entering on the common property at any point or points not then in the actual occupancy of the nonjoining cotenants or joint tenants and enjoying all rights of occupancy of the property, without waste and, in the case of mining property, from mining the same in a minerlike manner and extracting, milling, and disposing of the ore from the common property, paying its or their own expenses and subject to accounting to the nonjoining cotenant or joint tenant for the net profits of such mining operations, if any made, and all liens for labor and materials incurred in such mining shall attach only to the undivided interest or interests of the working cotenants or joint tenants, but nothing herein shall prevent or preclude the cotenant or joint tenant, not joining in the operation of such mining property, from receiving his, its, or their proportionate share of all ore or ores on the dump upon payment or tendering payment of the actual cost of mining the same.

**History: En. Sec. 2, p. 454, Bannack Stat.; re-en. Sec. 2, p. 504, Cod. Stat. 1871; re-en. Sec. 771, 5th Div. Rev. Stat. 1879; re-en. Sec. 1285, 5th Div. Comp. Stat. 1887; amd. Sec. 592, C. Civ. Proc. 1895; en. Sec. 1, p. 134, L. 1899; re-en. Sec. 6499, Rev. C. 1907; re-en. Sec. 9091, R.C.M. 1921; re-en. Sec. 9091, R.C.M. 1935; R.C.M. 1947, 93-2829.**

**70-19-203. Adverse claims under acts of congress.** In an action brought to determine the respective rights of claimants to the possession of a mining claim or quartz lode under the provisions of the acts of congress of the United States, it is immaterial which party is in possession, and it is sufficient to confer jurisdiction upon the court if it appears from the pleadings that the application for a patent has been made and an adverse claim thereto filed and allowed in the proper land office, and the verdict or decision must find which party is entitled to the possession of the premises in dispute.

**History: En. Sec. 1322, C. Civ. Proc. 1895; re-en. Sec. 6882, Rev. C. 1907; re-en. Sec. 9500, R.C.M. 1921; re-en. Sec. 9500, R.C.M. 1935; R.C.M. 1947, 93-6224.**

**70-19-204. Order for inspection or survey.** (1) Whenever any person shall have any right to or interest in any lead, lode, or mining claim which is in the possession of another person and it shall be necessary for the ascertainment, enforcement, or protection of such right or interest that an inspection, examination, or survey of such lead, mine, lode, or mining claim should be had or made or whenever any inspection, examination, or survey of any such lode or mining claim shall be necessary to protect, ascertain, or enforce the right or interest of any person in another mine, lode, or mining claim and the person in possession of the same shall refuse for a period of 3 days after demand therefor in writing to allow such inspection, examination, or survey to be had or made, the party so desiring the same may present to the district court or a judge thereof of the county wherein the mine, lead, lode, or mining claim is situated a petition under oath setting out his interest in the premises, describing the same, that the premises are in the possession of a party, naming him, the reason why such examination, inspection, or survey is necessary, the demand made on the person in possession so to permit such examination, inspection, or survey, and his refusal so to do.

(2) The court or judge shall thereupon appoint a time and place for hearing such petition and shall order notice thereof to be served upon the adverse party, which notice shall be served at least 1 day before the day of hearing. On the hearing either party may read affidavits or produce oral testimony, and if the court or judge is satisfied that the facts stated in the petition are true, he shall make an order for an inspection, examination, or survey of the lode or mining claim in question in such manner, at such time, and by such persons as are mentioned in the order. Such person shall thereupon have free access to such mine, lead, lode, or mining claim for the purpose of making such inspection, examination, or survey, and any interference with such person while acting under such order shall be contempt of court.

(3) If the order of the court is made while an action is pending between the parties to the order, the costs of obtaining the order shall abide the result of the action, but all costs of making such examination or survey shall be paid by the petitioner.

**History: En. Sec. 8, p. 10, L. 1881; re-en. Sec. 376, 1st Div. Comp. Stat. 1887; re-en. Sec. 1317, C. Civ. Proc. 1895; re-en. Sec. 6876, Rev. C. 1907; re-en. Sec. 9494, R.C.M. 1921; re-en. Sec. 9494, R.C.M. 1935; R.C.M. 1947, 93-6218.**

## Part 3

## Provisions and Limitations Relating to the State of Montana

**70-19-301. Application to lands conveyed by state.** The provisions of parts 3 and 4 shall apply to all lands sold and conveyed before July 1, 1955, by the state of Montana for which a valid consideration was received by the state; provided that the state, at the time of any such sale or conveyance, was not precluded by the constitution of Montana or by the terms of the grant of such lands by the United States from selling and disposing of the same; and provided further, that no occupant of a public way or other ground dedicated or appropriated by the state to public use and not subject to sale shall acquire by reason of his occupancy any title thereto.

**History: En. Sec. 1, Ch. 195, L. 1955; R.C.M. 1947, 93-2516.**

**70-19-302. Statute of limitations for state actions concerning real property.** The state will not sue any person for or in respect to any real property or the issues or profits thereof by reason of the right or title of the state to the same unless:

(1) such right or title shall have accrued within 10 years before any action or other proceeding for the same is commenced; or

(2) the state or those from whom it claims shall have received the rents and profits of such real property or of some part thereof within the space of 10 years.

**History: En. Sec. 480, C. Civ. Proc. 1895; re-en. Sec. 6429, Rev. C. 1907; re-en. Sec. 9012, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 315; re-en. Sec. 9012, R.C.M. 1935; R.C.M. 1947, 93-2501.**

**70-19-303. Statute of limitations for actions by grantee — joinder of state.** (1) No action can be brought for or in respect to real property by any person claiming under letters patent or grants from this state unless the plaintiff, his ancestor, predecessor, or grantor was seized or possessed of the property in question within 10 years before the commencement of the action.

(2) In any such action the state of Montana may be made a party defendant and shall have only the defenses thereto as are available to other parties defendant to the action, provided that no judgment in any such action shall include damages, attorney fees, or court costs against the state of Montana.

**History: En. Sec. 481, C. Civ. Proc. 1895; re-en. Sec. 6430, Rev. C. 1907; re-en. Sec. 9013, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 316; re-en. Sec. 9013, R.C.M. 1935; amd. Sec. 1, Ch. 196, L. 1955; R.C.M. 1947, 93-2502.**

**70-19-304. Statute of limitations for action for recovery of property under void conveyance from state.** When letters patent or grants of real property issued or made by the state are declared void by the determination of a competent court, an action for the recovery of the property so conveyed may be brought, either by the state or by any subsequent patentee or grantee of the property, his heirs, or assigns, within 10 years after such determination, but not after that period.

**History: En. Sec. 482, C. Civ. Proc. 1895; re-en. Sec. 6431, Rev. C. 1907; re-en. Sec. 9014, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 317; re-en. Sec. 9014, R.C.M. 1935; R.C.M. 1947, 93-2503.**

**70-19-305. Certificate of purchase from state or United States prima facie evidence of ownership.** A certificate of purchase or of location of any lands in this state issued or made in pursuance of any law of the United States or of this state is prima facie evidence that the holder or assignee of such certificate is the owner of the land described therein, but this evidence may be overcome by proof that at the time of the location or time of filing a preemption claim on which the certificate may have been issued, the land was in the adverse possession of the adverse party or those under whom he claims or that the adverse party is holding the land for mining purposes.

**History: En. Sec. 3213, C. Civ. Proc. 1895; re-en. Sec. 7931, Rev. C. 1907; re-en. Sec. 10575, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1925; re-en. Sec. 10575, R.C.M. 1935; R.C.M. 1947, 93-1001-37.**

## Part 4

## Limitations and Adverse Possession

**70-19-401. Action for recovery — possession within 5 years required.** No action for the recovery of real property or for the possession thereof can be maintained unless it appear that the plaintiff, his ancestor, predecessor, or grantor was seized or possessed of the property in question within 5 years before the commencement of the action.

**History: En. Sec. 29, p. 45, L. 1877; re-en. Sec. 29, 1st Div. Rev. Stat. 1879; re-en. Sec. 29, 1st Div. Comp. Stat. 1887; amd Sec. 483, C. Civ. Proc. 1895; re-en. Sec. 6432, Rev. C. 1907; re-en. Sec. 9015, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 318; re-en. Sec. 9015, R.C.M. 1935; amd. Sec. 1, Ch. 224, L. 1953; amd. Sec. 12, Ch. 263, L. 1975; R.C.M. 1947, 93-2504.**

**70-19-402. Action or defense arising out of title to property or profits — possession within 5 years required.** No cause of action or defense to an action, arising out of the title to real property or to rents or profits out of the same, can be effectual unless it appear that the person prosecuting the action or making the defense or under whose title the action is prosecuted or the defense is made or the ancestor, predecessor, or grantor of such person was seized or possessed of the premises in question within 5 years before the commencement of the act in respect to which such action is prosecuted or defense made.

**History: En. Sec. 30, p. 45, L. 1877; re-en. Sec. 30, 1st Div. Rev. Stat. 1879; re-en. Sec. 30, 1st Div. Comp. Stat. 1887; amd. Sec. 484, C. Civ. Proc. 1895; re-en. Sec. 6433, Rev. C. 1907; re-en. Sec. 9016, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 319; re-en. Sec. 9016, R.C.M. 1935; amd. Sec. 2, Ch. 224, L. 1953; R.C.M. 1947, 93-2505.**

**70-19-403. When action on claim by entry must be commenced.** No entry upon real estate is deemed sufficient or valid as a claim unless an action be commenced thereupon within 1 year after making such entry and within 5 years from the time when the right to make it descended or accrued.

**History: En. Sec. 3, p. 466, Bannack Stat.; re-en. Sec. 3, p. 515, Cod. Stat. 1871; amd. Sec. 31, p. 46, L. 1877; re-en. Sec. 31, 1st Div. Rev. Stat. 1879; re-en. Sec. 31, 1st Div. Comp. Stat. 1887; amd. Sec. 485, C. Civ. Proc. 1895; re-en. Sec. 6434, Rev. C. 1907; re-en. Sec. 9017, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 320; re-en. Sec. 9017, R.C.M. 1935; amd. Sec. 3, Ch. 224, L. 1953; R.C.M. 1947, 93-2506.**

**70-19-404. Presumption of possession within prescribed period — adverse possession as exception.** In every action for the recovery of real property or the possession thereof, the person establishing a legal title to the property is presumed to have been possessed thereof within the time required by law, and the occupation of the property by any other person is deemed to have been under and in subordination to the legal title unless it appear that the property has been held and possessed adversely to such legal title for 5 years before the commencement of the action.

**History: En. Sec. 4, p. 466, Bannack Stat.; re-en. Sec. 4, p. 515, Cod. Stat. 1871; amd. Sec. 32, p. 46, L. 1877; re-en. Sec. 32, 1st Div. Rev. Stat. 1879; re-en. Sec. 32, 1st Div. Comp. Stat. 1887; amd. Sec. 486, C. Civ. Proc. 1895; re-en. Sec. 6435, Rev. C. 1907; re-en. Sec. 9018, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 321; re-en. Sec. 9018, R.C.M. 1935; amd. Sec. 4, Ch. 224, L. 1953; R.C.M. 1947, 93-2507.**

**70-19-405. Title by prescription.** Occupancy for the period prescribed by this chapter as sufficient to bar an action for the recovery of the property confers a title thereto, denominated a title by prescription, which is sufficient against all.

**History: En. Sec. 1391, Civ. C. 1895; re-en. Sec. 4571, Rev. C. 1907; re-en. Sec. 6818, R.C.M. 1921; Cal. Civ. C. Sec. 1007; Field Civ. C. Sec. 441; re-en. Sec. 6818, R.C.M. 1935; R.C.M. 1947, 67-1203.**

**70-19-406. Simple occupancy.** Occupancy for any period confers a title sufficient against all except the state and those who have title by prescription, accession, transfer, will, or succession.

**History: En. Sec. 1390, Civ. C. 1895; re-en. Sec. 4570, Rev. C. 1907; re-en. Sec. 6817, R.C.M. 1921; Cal. Civ. C. Sec. 1006; Field Civ. C. Sec. 440; re-en. Sec. 6817, R.C.M. 1935; R.C.M. 1947, 67-1202.**

**70-19-407. Occupancy under claim founded on instrument or judgment — when considered adverse.** When it appears that the occupant or those under whom he claims entered into the possession of the property under claim of title, exclusive of other right, founding such claim upon a written instrument as being a conveyance of the property in question or upon the decree or judgment of a competent court and that there has been a continued occupation and possession of the property included in such instrument, decree, or judgment or of some part of the property under such claim for 5 years, the property so included is deemed to have been held adversely, except that when it consists of a tract divided into lots, the possession of one lot is not deemed a possession of any other lot of the same tract.

**History: En. Sec. 33, p. 46, L. 1877; re-en. Sec. 33, 1st Div. Rev. Stat. 1879; re-en. Sec. 33, 1st Div. Comp. Stat. 1887; amd. Sec. 487, C. Civ. Proc. 1895; re-en. Sec. 6436, Rev. C. 1907; re-en. Sec. 9019, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 322; re-en. Sec. 9019, R.C.M. 1935; amd. Sec. 5, Ch. 224, L. 1953; R.C.M. 1947, 93-2508.**

**70-19-408. Claim founded on instrument or judgment — what considered possession and occupation.** (1) For the purpose of constituting an adverse possession by any person claiming a title founded upon a written instrument or a judgment or decree, land is deemed to have been possessed and occupied in the following cases:

(a) where it has been usually cultivated or improved;

(b) where it has been protected by a substantial enclosure;

(c) where although not enclosed it has been used for the supply of fuel or of fencing timber, either for the purpose of husbandry or for pasturage or for the ordinary use of the occupant.

(2) Where a known farm or a single lot has been partly improved, the portion of such farm or lot that has been left not cleared or not enclosed, according to the usual course and custom of the adjoining country, shall be deemed to have been occupied for the same length of time as the part improved and cultivated.

**History: En. Sec. 5, p. 466, Bannack Stat.; re-en. Sec. 5, p. 516, Cod. Stat. 1871; amd. Sec. 34, p. 46, L. 1877; re-en. Sec. 34, 1st Div. Rev. Stat. 1879; re-en. Sec. 34, 1st Div. Comp. Stat. 1887; amd. Sec. 488, C. Civ. Proc. 1895; re-en. Sec. 6437, Rev. C. 1907; re-en. Sec. 9020, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 323; re-en. Sec. 9020, R.C.M. 1935; R.C.M. 1947, 93-2509.**

**70-19-409. Actual occupancy under claim of title not founded on instrument or judgment — adverse.** Where it appears that there has been an actual continued occupation of land under a claim of title, exclusive of any other right, but not founded upon a written instrument, judgment, or decree, the land so actually occupied and no other is deemed to have been held adversely.

**History: En. Sec. 6, p. 467, Bannack Stat.; re-en. Sec. 6, p. 516, Cod. Stat. 1871; re-en. Sec. 35, p. 46, L. 1877; re-en. Sec. 35, 1st Div. Rev. Stat. 1879; re-en. Sec. 35, 1st Div. Comp. Stat. 1887; amd. Sec. 489, C. Civ. Proc. 1895; re-en. Sec. 6438, Rev. C. 1907; re-en. Sec. 9021, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 324; re-en. Sec. 9021, R.C.M. 1935; R.C.M. 1947, 93-2510.**

**70-19-410. Claim of title not founded on instrument or judgment — what considered occupation.** For the purpose of constituting an adverse possession by a person claiming title not founded upon a written instrument, judgment, or decree, land is deemed to have been possessed and occupied in the following cases only:

(1) where it has been protected by a substantial enclosure;

(2) where it has been usually cultivated or improved.

**History: En. Sec. 7, p. 467, Bannack Stat.; re-en. Sec. 7, p. 516, Cod. Stat. 1871; amd. Sec. 36, p. 47, L. 1877; re-en. Sec. 36, 1st Div. Rev. Stat. 1879; re-en. Sec. 36, 1st Div. Comp. Stat. 1887; re-en. Sec. 490, C. Civ. Proc. 1895; re-en. Sec. 6439,**

**Rev. C. 1907; re-en. Sec. 9022, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 325; re-en. Sec. 9022, R.C.M. 1935; R.C.M. 1947, 93-2511.**

**70-19-411. Occupancy and payment of taxes necessary to prove adverse possession.** In no case shall adverse possessions be considered established under this code unless it shall be shown that the land has been occupied and claimed for a period of 5 years continuously and the party or persons, their predecessors, and grantors have during such period paid all the taxes, state, county, or municipal, which have been legally levied and assessed upon said land.

**History: En. Sec. 1, Ch. 3, L. 1917; re-en. Sec. 9024, R.C.M. 1921; re-en. Sec. 9024, R.C.M. 1935; amd. Sec. 7, Ch. 224, L. 1953; R.C.M. 1947, 93-2513.**

**70-19-412. Relation of landlord and tenant as affecting adverse possession.** When the relation of landlord and tenant has existed between any persons, the possession of the tenant is deemed the possession of the landlord until the expiration of 5 years from the termination of the tenancy or, where there has been no written lease, until the expiration of 5 years from the time of the last payment of rent, notwithstanding such tenant may have acquired another title or may have claimed to hold adversely to his landlord. But such presumptions cannot be made after the periods prescribed in this section.

**History: En. Sec. 37, p. 47, L. 1877; re-en. Sec. 37, 1st Div. Rev. Stat. 1879; re-en. Sec. 37, 1st Div. Comp. Stat. 1887; amd. Sec. 491, C. Civ. Proc. 1895; re-en. Sec. 6440, Rev. C. 1907; re-en. Sec. 9023, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 326; re-en. Sec. 9023, R.C.M. 1935; amd. Sec. 6, Ch. 224, L. 1953; R.C.M. 1947, 93-2512.**

**70-19-413. Certain disabilities to suspend running of statutory period.** (1) If a person entitled to commence an action for the recovery of real property or for the recovery of the possession thereof or for dower or to make any entry or defense founded on the title to real property or to rents or services out of the same is, at the same time such title first descends or accrues, either:

(a) within the age of majority;
(b) insane; or
(c) imprisoned on a criminal charge or in execution upon conviction of a criminal offense for a term of less than for life.

(2) The time during which disability continues is not deemed any portion of the time in this chapter limited for the commencement of such action or the making of such entry or defense, but such action may be commenced or entry or defense made within the period of 5 years after such disability shall cease or after the death of the person entitled who shall die under such disability, but such action shall not be commenced or entry or defense made after that period.

**History: En. Sec. 39, p. 48, L. 1877; re-en. Sec. 39, 1st Div. Rev. Stat. 1879; re-en. Sec. 39, 1st Div. Comp. Stat. 1887; amd. Sec. 493, C. Civ. Proc. 1895; re-en. Sec. 6442, Rev. C. 1907; re-en. Sec. 9026, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 328; re-en. Sec. 9026, R.C.M. 1935; amd. Sec. 8, Ch. 224, L. 1953; R.C.M. 1947, 93-2515.**

**70-19-414. Right of possession not affected by descent cast.** The right of a person to the possession of real property is not impaired or affected by a descent being cast in consequence of the death of a person in possession of such property.

**History: En. Sec. 38, p. 48, L. 1877; re-en. Sec. 38, 1st Div. Rev. Stat. 1879; re-en. Sec. 38, 1st Div. Comp. Stat. 1887; re-en. Sec. 492, C. Civ. Proc. 1895;**

**re-en. Sec. 6441, Rev. C. 1907; re-en. Sec. 9025, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 327; re-en. Sec. 9025, R.C.M 1935; R.C.M. 1947, 93-2514.**

# CHAPTER 20

# TRANSFER OF REAL PROPERTY

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## Part 1

## Method of Transfer

**70-20-101. Transfer to be in writing — statute of frauds.** (1) An estate in real property, other than an estate at will or for a term not exceeding 1 year, can be transferred only by operation of law or by an instrument in writing subscribed by the party disposing of the same or by his agent thereunto authorized by writing.

(2) No estate or interest in real property, other than for leases for a term not exceeding 1 year, or any trust over or power concerning it or in any manner relating thereto can be created, granted, assigned, surrendered, or declared otherwise than by operation of law or a conveyance or other instrument in writing, subscribed by the party creating, granting, assigning, surrendering, or declaring the same or by his lawful agent thereunto authorized by writing.

**History: (1)En. Sec. 1500, Civ. C. 1895; re-en. Sec. 4612, Rev. C. 1907; re-en. Sec. 6859, R.C.M. 1921; Cal. Civ. C. Sec. 1091; Field Civ. C. Sec. 483; re-en. Sec. 6859, R.C.M. 1935; Sec. 67-1601, R.C.M. 1947; (2)En. Sec. 6, p. 393, Cod. Stat. 1871; re-en. Sec. 160, 5th Div. Rev. Stat. 1879; re-en. Sec. 217, 5th Div. Comp. Stat. 1887; re-en. Sec. 3274, C. Civ. Proc. 1895; re-en. Sec. 7967, Rev. C. 1907; re-en. Sec. 10611, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1971; re-en. Sec. 10611, R.C.M. 1935; Sec. 93-1401-5, R.C.M. 1947; R.C.M. 1947, 67-1601, 93-1401-5.**

**70-20-102. Exceptions to statute of frauds.** Section 70-20-101(2) must not be construed to:

(1) affect the power of a testator in the disposition of his real property by a last will and testament;

(2) prevent any trust from arising or being extinguished by implication or operation of law; or

(3) abridge the power of any court to compel the specific performance of an agreement, in case of part performance thereof.

**History: En. Sec. 7, p. 393, Cod. Stat. 1871; re-en. Sec. 161, 5th Div. Rev. Stat. 1879; re-en. Sec. 218, 5th Div. Comp. Stat. 1887; re-en. Sec. 3275, C. Civ. Proc. 1895; re-en. Sec. 7968, Rev. C. 1907; re-en. Sec. 10612, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1972; re-en. Sec. 10612, R.C.M. 1935; R.C.M. 1947, 93-1401-6.**

**70-20-103. Form of grant.** A grant of an estate in real property may be made in substance as follows:

"I, A.B., in consideration of .... dollars now paid, grant to C.D. all the real property situated in (insert name of county) County, state of Montana, bounded (or described) as follows: (Here insert description, or if the land sought to be conveyed has a descriptive name, it may be described by the name as, for instance, "the Norris ranch".)

Witness my hand this (insert day) day of (insert month), 19...

..........................................................................

A.B."

**History: En. Sec. 1501, Civ. C. 1895; re-en. Sec. 4613, Rev. C. 1907; re-en. Sec. 6860, R.C.M. 1921; Cal. Civ. C. Sec. 1092; re-en. Sec. 6860, R.C.M. 1935; R.C.M. 1947, 67-1602.**

**70-20-104. Words of inheritance unnecessary.** Words of inheritance or succession are not requisite to transfer a fee in real property.

**History: En. Sec. 1476, Civ. C. 1895; re-en. Sec. 4608, Rev. C. 1907; re-en. Sec. 6855, R.C.M. 1921; Cal. Civ. C. Sec. 1072; Field Civ. C. Sec. 478; re-en. Sec. 6855, R.C.M. 1935; R.C.M. 1947, 67-1521.**

**70-20-105. Joint tenancy — how created.** (1) A joint tenancy as to any interest in real property may be established by the owner thereof by designating in the instrument of conveyance or transfer the names of such joint tenants, including his own, without the necessity of any transfer or conveyance to or through a third person.

(2) All joint tenancies created in this manner prior to July 1, 1963, are sufficient in law to create a joint tenancy.

**History: En. Sec. 1, Ch. 208, L. 1963; amd. Sec. 1, Ch. 9, L. 1971; R.C.M. 1947, 67-1602.1.**

**70-20-106. Grant by married person — how acknowledged.** No estate in the real property of a married person passes by any grant purporting to be executed or acknowledged by such person unless the grant or instrument is acknowledged by the grantor in the manner prescribed by 1-5-206 and 1-5-207.

**History: En. Sec. 1502, Civ. C. 1895; re-en. Sec. 4614, Rev. C. 1907; re-en. Sec. 6861, R.C.M. 1921; Cal. Civ. C. Sec. 1093; Based on Field Civ. C. Sec. 486; re-en. Sec. 6861, R.C.M. 1935; amd. Sec. 33, Ch. 535, L. 1975; R.C.M. 1947, 67-1603.**

**70-20-107. Power of attorney of married woman — how acknowledged.** A power of attorney of a married woman, authorizing the execution of an instrument transferring an estate in her separate real property, has no validity for that purpose unless acknowledged by her in the manner provided in 1-5-206 and 1-5-207.

**History: En. Sec. 1503, Civ. C. 1895; re-en. Sec. 4615, Rev. C. 1907; re-en. Sec. 6862, R.C.M. 1921; Cal. Civ. C. Sec. 1094; re-en. Sec. 6862, R.C.M. 1935; R.C.M. 1947, 67-1604.**

**70-20-108. Attorney-in-fact — how must execute for principal.** When an attorney-in-fact executes an instrument transferring an estate in real property, he must subscribe the name of his principal to it and his own name as attorney-in-fact.

**History: En. Sec. 1504, Civ. C. 1895; re-en. Sec. 4616, Rev. C. 1907; re-en. Sec. 6863, R.C.M. 1921; Cal. Civ. C. Sec. 1095; re-en. Sec. 6863, R.C.M. 1935; R.C.M. 1947, 67-1605.**

**70-20-109. Change of owner's name after acquisition — later conveyance to include former name.** Any person in whom the title of real estate is vested, who shall afterwards from any cause have his or her name changed, shall, in any conveyances of said real estate so held, set forth the name in which he or she derived title to said real estate, and a failure to comply with the provisions of this section shall subject any such person to a penalty of $50, to be collected by the county attorney of the county in which the real estate is situated and by him paid into the treasury of said county for the benefit of the common schools thereof.

**History: En. Sec. 1505, Civ. C. 1895; re-en. Sec. 4617, Rev. C. 1907; re-en. Sec. 6864, R.C.M. 1921; Cal. Civ. C. Sec. 1096; re-en. Sec. 6864, R.C.M. 1935; R.C.M. 1947, 67-1606.**

**70-20-110. Redelivery or cancellation of grant — no retransfer.** Redelivering a grant of real property to the grantor or canceling it does not operate to retransfer the title.

**History: En. Sec. 1456, Civ. C. 1895; re-en. Sec. 4600, Rev. C. 1907; re-en. Sec. 6847, R.C.M. 1921; Cal. Civ. C. Sec. 1058; Field Civ. C. Sec. 469; re-en. Sec. 6847, R.C.M. 1935; R.C.M. 1947, 67-1513.**

## Part 2

## Construction of Grant

**70-20-201. Rules for construing description.** The following are the rules for construing the descriptive part of a conveyance of real property when the construction is doubtful and there are no other sufficient circumstances to determine it:

(1) Where there are certain definite and ascertained particulars in the description, the addition of others which are indefinite, unknown, or false does not frustrate the conveyance, but it is to be construed by the first mentioned particulars.

(2) When permanent and visible or ascertained boundaries or monuments are inconsistent with the measurement, either of lines, angles, or surfaces, the boundaries or monuments are paramount.

(3) Between different measurements which are inconsistent with each other, that of angles is paramount to that of surfaces and that of lines paramount to both.

(4) When a road or stream of water not navigable is the boundary, the rights of the grantor to the middle of the road or the thread of the stream are included in the conveyance, except where the road or thread of the stream is held under another title.

(5) When a navigable lake, where there is no tide, is the boundary, the rights of the grantor to low watermark are included in the conveyance.

(6) When the description refers to a map and that reference is inconsistent with other particulars, it controls them if it appear that the parties acted with reference to the map; otherwise, the map is subordinate to other definite and ascertained particulars.

**History: En. Sec. 3413, C. Civ. Proc. 1895; re-en. Sec. 8039, Rev. C. 1907; re-en. Sec. 10683, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 2077; re-en. Sec. 10683, R.C.M. 1935; R.C.M. 1947, 93-2201-4.**

**70-20-202. Extrinsic evidence not to be considered in construction of deed — exceptions.** (1) When the terms of an agreement have been reduced to writing by the parties, it is to be considered as containing all those terms, and therefore there can be between the parties and their representatives or successors in interest no evidence of the terms of the agreement other than the contents of the writing except in the following cases:

(a) where a mistake or imperfection of the writing is put in issue by the pleadings;

(b) where the validity of the agreement is the fact in dispute.

(2) But this section does not exclude other evidence of the circumstances under which the agreement was made or to which it relates, as defined in 1-4-102, or to explain an extrinsic ambiguity or to establish illegality or fraud.

(3) The term "agreement" includes deeds and wills as well as contracts between parties.

**History: En. Sec. 610, p. 198, L. 1877; re-en. Sec. 610, 1st Div. Rev. Stat. 1879; re-en. Sec. 628, 1st Div. Comp. Stat. 1887; re-en. Sec. 3132, C. Civ. Proc. 1895; re-en. Sec. 7873, Rev. C. 1907; re-en. Sec. 10517, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1856; re-en. Sec. 10517, R.C.M. 1935; R.C.M. 1947, 93-401-13.**

## Part 3

## Effect of Transfer

**70-20-301. Fee simple presumed to pass.** A fee simple title is presumed to be intended to pass by a grant of real property unless it appears from the grant that a lesser estate was intended.

**History: En. Sec. 1511, Civ. C. 1895; re-en. Sec. 4619, Rev. C. 1907; re-en. Sec. 6866, R.C.M. 1921; Cal. Civ. C. Sec. 1105; re-en. Sec. 6866, R.C.M. 1935; R.C.M. 1947, 67-1608.**

**70-20-302. After-acquired title to pass by operation of law.** Where a person purports by proper instrument to grant real property in fee simple and subsequently acquires any title or claim of title thereto, the same passes by operation of law to the grantee or his successors.

**History: En. Sec. 32, p. 401, Cod. Stat. 1871; re-en. Sec. 209, 5th Div. Rev. Stat. 1879; re-en. Sec. 267, 5th Div. Comp. Stat. 1887; amd. Sec. 1512, Civ. C. 1895; re-en. Sec. 4620, Rev. C. 1907; re-en. Sec. 6867, R.C.M. 1921; Cal. Civ. C. Sec. 1106; re-en. Sec. 6867, R.C.M. 1935; R.C.M. 1947, 67-1609.**

**70-20-303. Grant conclusive — exception for good faith purchaser.** Every grant of an estate in real property is conclusive against the grantor, also against every one subsequently claiming under him, except a purchaser or encumbrancer who in good faith and for a valuable consideration acquires a title or lien by an instrument that is first duly recorded.

**History: En. Sec. 1513, Civ. C. 1895; re-en. Sec. 4621, Rev. C. 1907; re-en. Sec. 6868, R.C.M. 1921; Cal. Civ. C. Sec. 1107; Field Civ. C. Sec. 490; re-en. Sec. 6868, R.C.M. 1935; R.C.M. 1947, 67-1610.**

**70-20-304. Implied covenants — free from encumbrance.** (1) From the use of the word "grant" in any conveyance by which an estate of inheritance or fee simple or possessory title is to be passed, the following covenants and none other on the part of the grantor for himself and his heirs to the grantee, his heirs, and assigns are implied unless restrained by express terms contained in such conveyance:

(a) that previous to the time of the execution of such conveyance the grantor has not conveyed the same estate or any right, title, or interest therein to any person other than the grantee;

(b) that such estate is at the time of the execution of such conveyance free from encumbrances done, made, or suffered by the grantor or any person claiming under him.

(2) Such convenants may be sued upon in the same manner as if they had been expressly inserted in the conveyance.

**History: En. Sec. 50, p. 487, Bannack Stat.; re-en. Sec. 50, p. 404, Cod. Stat. 1871; re-en. Sec. 227, 5th Div. Rev. Stat. 1879; re-en. Sec. 285, 5th Div. Comp. Stat. 1887; amd. Sec. 1519, Civ. C. 1895; re-en. Sec. 4627, Rev. C. 1907; re-en. Sec. 6874, R.C.M. 1921; Cal. Civ. C. Sec. 1113; re-en. Sec. 6874, R.C.M. 1935; R.C.M. 1947, 67-1616.**

**70-20-305. Encumbrance defined.** The term "encumbrances" includes taxes, assessments, and all liens upon real property.

**History: En. Sec. 1520, Civ. C. 1895; re-en. Sec. 4628, Rev. C. 1907; re-en. Sec. 6875, R.C.M. 1921; Cal. Civ. C. Sec. 1114; re-en. Sec. 6875, R.C.M. 1935; R.C.M. 1947, 67-1617.**

**70-20-306. Responsibility of heirs of covenantor — certain warranties abolished.** Lineal and collateral warrants, with all their incidents, are abolished, but the heirs and devisees of every person who has made any covenant or agreement in reference to the title of, in, or to any real property are answerable upon such covenant or agreement to the extent of the land descended or devised to them in the cases and in the manner prescribed by law.

**History: En. Sec. 49, p. 487, Bannack Stat.; re-en. Sec. 49, p. 403, Cod. Stat. 1871; re-en. Sec. 226, 5th Div. Rev. Stat. 1879; re-en. Sec. 284, 5th Div. Comp. Stat. 1887; amd. Sec. 1521, Civ. C. 1895; re-en. Sec. 4629, Rev. C. 1907; re-en. Sec. 6876, R.C.M. 1921; Cal. Civ. C. Sec. 1115; re-en. Sec. 6876, R.C.M. 1935; R.C.M. 1947, 67-1618.**

**70-20-307. Transfer of land bounded by highway — what passes.** A transfer of land bounded by a highway passes the title of the person whose estate is transferred to the soil of the highway in front of the center thereof unless a different intent appears from the grant.

**History: En. Sec. 1518, Civ. C. 1895; re-en. Sec. 4626, Rev. C. 1907; re-en. Sec. 6873, R.C.M. 1921; Cal. Civ. C. Sec. 1112; Based on Field Civ. C. Sec. 492; re-en. Sec. 6873, R.C.M. 1935; R.C.M. 1947, 67-1615.**

**70-20-308. Easements to pass with property.** A transfer of real property passes all easements attached thereto and creates in favor thereof an easement to use other real property of the person whose estate is transferred in the same manner and to the same extent as such property was obviously and permanently used by the person whose estate is transferred for the benefit thereof at the time when the transfer was agreed upon or completed.

**History: En. Sec. 1510, Civ. C. 1895; re-en. Sec. 4618, Rev. C. 1907; re-en. Sec. 6865, R.C.M. 1921; Cal. Civ. C. Sec. 1104; Field Civ. C. Sec. 488; re-en. Sec. 6865, R.C.M. 1935; R.C.M. 1947, 67-1607.**

**70-20-309. Transfer of owner ousted of possession — effect.** Any person claiming title to real property in the adverse possession of another may transfer it with the same effect as if in actual possession.

**History: En. Sec. 1443, Civ. C. 1895; re-en. Sec. 4593, Rev. C. 1907; re-en. Sec. 6840, R.C.M. 1921; Cal. Civ. C. Sec. 1047; re-en. Sec. 6840, R.C.M. 1935; R.C.M. 1947, 67-1506.**

**70-20-310. Conveyance in joint tenancy — right of survivorship.** In all conveyances of real property made in joint tenancy or to tenants in estates by entirety where the right of survivorship is contained in the grant of such conveyance, the right of survivorship is hereby expressly declared to exist by virtue of such grant.

**History: En. Sec. 1, Ch. 118, L. 1943; R.C.M. 1947, 67-310.**

**70-20-311. Grant on condition subsequent.** When a grant is made upon condition subsequent and is subsequently defeated by the nonperformance of the condition, the person otherwise entitled to hold under the grant must reconvey the property to the grantor or his successors by grant duly acknowledged for record.

**History: En. Sec. 1515, Civ. C. 1895; re-en. Sec. 4623, Rev. C. 1907; re-en. Sec. 6870, R.C.M. 1921; Cal. Civ. C. Sec. 1109; re-en. Sec. 6870, R.C.M. 1935; R.C.M. 1947, 67-1612.**

**70-20-312. Grant on condition precedent.** An instrument purporting to be a grant of real property to take effect upon condition precedent passes the estate upon the performance of the condition.

**History: En. Sec. 1516, Civ. C. 1895; re-en. Sec. 4624, Rev. C. 1907; re-en. Sec. 6871, R.C.M. 1921; Cal. Civ. C. Sec. 1110; re-en. Sec. 6871, R.C.M. 1935; R.C.M. 1947, 67-1613.**

**70-20-313. Grant by owner for life or years.** A grant made by an owner of an estate for life or years, purporting to transfer a greater estate than he could lawfully transfer, does not work a forfeiture of his estate but passes to the grantee all the estate which the grantor could lawfully transfer.

**History: En. Sec. 1514, Civ. C. 1895; re-en. Sec. 4622, Rev. C. 1907; re-en. Sec. 6869, R.C.M. 1921; Cal. Civ. C. Sec. 1108; Field Civ. C. Sec. 491; re-en. Sec. 6869, R.C.M. 1935; R.C.M. 1947, 67-1611.**

**70-20-314. Grant of property occupied by tenant.** When real property is occupied by a tenant, a grant of any estate therein by his landlord is valid without an attornment of the tenant to the grantee; but the payment of rent to such grantor by his tenant before notice of the grant is binding upon the grantee, and the tenant is not liable to the grantee for any breach of the condition of the lease until he has had notice of the grant.

**History: En. Sec. 1517, Civ. C. 1895; re-en. Sec. 4625, Rev. C. 1907; re-en. Sec. 6872, R.C.M. 1921; Cal. Civ. C. Sec. 1111; Field Civ. C. Sec. 493; re-en. Sec. 6872, R.C.M. 1935; R.C.M. 1947, 67-1614.**

**70-20-315. Validation of unacknowledged deeds.** All deeds to real property executed prior to January 1, 1973, in this state or any state or territory of the United States, provided no action is pending on July 1, 1973, to set aside any such deed, which shall have been signed by the grantors in due form, shall be sufficient in law to convey the legal title to the premises therein described from the grantors to the grantees, without any other execution or acknowledgment or witnesses thereto whatever; and such deeds so executed shall be received in evidence in all courts in this state and be conclusive evidence of the title to the lands therein described against the grantors, their heirs, and assigns.

**History: En. Sec. 1, Ch. 82, L. 1973; R.C.M. 1947, 39-139.**

**70-20-316. Deeds made prior to 1900 — presumption grantor had no wife.** When a deed to real property has been made, executed, and acknowledged prior to the year 1900 by a grantor without recital in the body of the deed or acknowledgment as to whether or not the grantor is married or single and the wife of such grantor, if any, not joining in the conveyance or otherwise releasing or conveying her dower, the presumption shall be that the person conveying such land had no wife living at the date of such conveyance and that such land was conveyed free of all right of dower, inchoate or vested.

**History: En. Sec. 1, Ch. 183, L. 1945; R.C.M. 1947, 39-131.**

## Part 4

## Fraudulent Conveyances

**70-20-401. Instrument made with intent to defraud — void.** Every instrument, other than a will, affecting an estate in real property, including every charge upon real property or upon its rents or profits, made with intent to defraud prior or subsequent purchasers thereof or encumbrancers thereon is void as against every purchaser or encumbrancer for value of the same property or the rents or profits thereof.

**History: En. Sec. 1, p. 492, Bannack Stat.; re-en. Sec. 1, p. 392, Cod. Stat. 1871; re-en. Sec. 155, 5th Div. Rev. Stat. 1879; re-en. Sec. 212, 5th Div. Comp. Stat. 1887; amd. Sec. 1650, Civ. C. 1895; re-en. Sec. 4688, Rev. C. 1907; re-en. Sec. 6939, R.C.M. 1921; Cal. Civ. C. Sec. 1227; Field Civ. C. Sec. 535; re-en. Sec. 6939, R.C.M. 1935; R.C.M. 1947, 29-201.**

**70-20-402. Instrument not void as to purchaser with notice — exception.** No instrument is to be avoided under 70-20-401 in favor of a subsequent purchaser or encumbrancer having notice thereof at the time his purchase was made or his lien acquired unless the person in whose favor the instrument was made was a privy to the fraud intended.

**History: En. Sec. 2, p. 492, Bannack Stat.; re-en. Sec. 2, p. 392, Cod. Stat. 1871; re-en. Sec. 156, 5th Div. Rev. Stat. 1879; re-en. Sec. 213, 5th Div. Comp. Stat.**

**1887; amd. Sec. 1651, Civ. C. 1895; re-en. Sec. 4689, Rev. C. 1907; re-en. Sec. 6940, R.C.M. 1921; Cal. Civ. C. Sec. 1228; Field Civ. C. Sec. 536; re-en. Sec. 6940, R.C.M. 1935; R.C.M. 1947, 29-202.**

**70-20-403. Grant by person with power to revoke — power executed.** (1) Where a power to revoke or modify an instrument affecting the title to or enjoyment of an estate in real property is reserved to the grantor or given to any other person, a subsequent grant of or charge upon the estate by the person having the power of revocation in favor of a purchaser or encumbrancer for value operates as a revocation of the original instrument, to the extent of the power, in favor of such purchaser or encumbrancer.

(2) Where a person having a power of revocation, within the provisions of subsection (1) is not entitled to execute it until after the time at which he makes such a grant or charge as described in that subsection, the power is deemed to be executed as soon as he is entitled to execute it.

**History: (1)En. Sec. 3, p. 492, Bannack Stat.; re-en. Sec. 3, p. 392, Cod. Stat. 1871; re-en. Sec. 157, 5th Div. Rev. Stat. 1879; re-en. Sec. 214, 5th Div. Comp. Stat. 1887; amd. Sec. 1652, Civ. C. 1895; re-en. Sec. 4690, Rev. C. 1907; re-en. Sec. 6941, R.C.M. 1921; Cal. Civ. C. Sec. 1229; Field Civ. C. Sec. 537; re-en. Sec. 6941, R.C.M. 1935; Sec. 29-203, R.C.M. 1947; (2)En. Sec. 1653, Civ. C. 1895; re-en. Sec. 4691, Rev. C. 1907; re-en. Sec. 6942, R.C.M. 1921; Cal. Civ. C. Sec. 1230; Field Civ. C. Sec. 538; re-en. Sec. 6942, R.C.M. 1935; Sec. 29-204, R.C.M. 1947; R.C.M. 1947, 29-203, 29-204.**

**70-20-404. Purchaser in good faith not affected.** The rights of a purchaser or encumbrancer in good faith and for value are not to be impaired by any of the foregoing provisions of this part.

**History: En. Sec. 1654, Civ. C. 1895; re-en. Sec. 4692, Rev. C. 1907; re-en. Sec. 6943, R.C.M. 1921; Field Civ. C. Sec. 539; re-en. Sec. 6943, R.C.M. 1935; R.C.M. 1947, 29-205.**

**70-20-405. Other provisions on unlawful transfers — where found.** Other provisions concerning unlawful transfers are contained in [29-207 to 29-210 and 18-201 to 18-205] concerning the special relations of debtor and creditor.

**History: En. Sec. 1655, Civ. C. 1895; re-en. Sec. 4693, Rev. C. 1907; re-en. Sec. 6944, R.C.M. 1921; Cal. Civ. C. Sec. 1231; Field Civ. C. Sec. 541; re-en. Sec. 6944, R.C.M. 1935; R.C.M. 1947, 29-206.**

# CHAPTER 21

# RECORDING TRANSFERS AND OTHER TRANSACTIONS RELATING TO REAL PROPERTY

### Part 1 — General Provisions

Section
70-21-101. Instrument defined — abstract.
70-21-102. Unrecorded instruments valid between parties.
70-21-103. Unrecorded deeds — to whom belong.
70-21-104. Removal of records prohibited — exceptions.

### Part 2 — Recording—Procedure

70-21-201. What may be recorded — recording copy in another county.

70-21-202. Certain transfers in trust — mortgages — when to be recorded.
70-21-203. Acknowledgment of instruments required — exceptions.
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70-21-205. Acknowledgment unnecessary for recording judgments.
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70-21-303. After-acquired interest — effect on notice.
70-21-304. Conveyance void as against other conveyance recorded first.
70-21-305. Abstract of conveyance — effect of recording.
70-21-306. Recording judgments to impart notice.
70-21-307. Effect of conveyance to grantee as trustee when no trust conditions provided.
70-21-308. Power of attorney contained in recorded instrument — how revoked.
70-21-309. Validation of conveyances recorded after defective execution — notice imparted.
70-21-310. Validation of recorded instruments omitting address of grantee — notice imparted.

## Part 1

## General Provisions

**70-21-101. Instrument defined — abstract.** For the purposes of Title 1, chapter 5, parts 1 through 3; part 2 of this chapter; and 70-21-310, the word instrument shall include an abstract of an instrument which shall be executed and acknowledged or proved by all parties executing the abstracted document and contains:

(1) the names and addresses of the parties thereto;
(2) a description of the real property affected;
(3) a statement that this is an abstract of another document;
(4) a short statement of the effect of the document abstracted;
(5) the name and address of the person who will provide a full and complete copy of the document abstracted, without cost, upon request of any person.

**History: En. Sec. 2, Ch. 218, L. 1971; R.C.M. 1947, 73-101.1.**

**70-21-102. Unrecorded instruments valid between parties.** An unrecorded instrument is valid as between the parties and those who have notice thereof.

**History: En. Sec. 1644, Civ. C. 1895; re-en. Sec. 4687, Rev. C. 1907; re-en. Sec. 6938, R.C.M. 1921; Cal. Civ. C. Sec. 1217; re-en. Sec. 6938, R.C.M. 1935; R.C.M. 1947, 73-205.**

**70-21-103. Unrecorded deeds — to whom belong.** Instruments essential to the title of real property and which are not kept in a public office as a record pursuant to law belong to the person in whom, for the time being, such title may be vested and pass with the title.

**History: En. Sec. 1373, Civ. C. 1895; re-en. Sec. 4568, Rev. C. 1907; re-en. Sec. 6815, R.C.M. 1921; Cal. Civ. C. Sec. 994; Field Civ. C. Sec. 438; re-en. Sec. 6815, R.C.M. 1935; R.C.M. 1947, 67-1113.**

**70-21-104. Removal of records prohibited — exceptions.** The record of a conveyance of real property or any other record, a transcript of which is admissible in evidence, must not be removed from the office where it is kept, except upon the order of a court or judge in cases where the inspection of the record is shown to be essential to the just determination of the cause or proceeding pending or where the court is held in the same building with such office.

**History: En. Sec. 3240, C. Civ. Proc. 1895; re-en. Sec. 7953, Rev. C. 1907; re-en. Sec. 10597, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1950; re-en. Sec. 10597, R.C.M. 1935; R.C.M. 1947, 93-1101-20.**

## Part 2

## Recording — Procedure

**70-21-201. What may be recorded — recording copy in another county.** (1) Any instrument or judgment affecting the title to or possession of real property may be recorded under this part.

(2) When any instrument or judgment affecting the title to or possession of real property situated in more than one county in this state has been recorded in either of such counties, a copy thereof, certified to by the county clerk of the county in which it has been recorded, may be recorded in any other county in this state wherein any portion of the real property affected by such instrument or judgment is situated, and such records will have the same effect as if the original instrument or judgment had been so recorded.

**History: En. Sec. 1570, Civ. C. 1895; re-en. Sec. 4643, Rev. C. 1907; amd. Sec. 1, Ch. 28, L. 1919; re-en. Sec. 6890, R.C.M. 1921; Cal. Civ. C. Sec. 1158; Field Civ. C. Sec. 508; re-en. Sec. 6890, R.C.M. 1935; R.C.M. 1947, 73-101.**

**70-21-202. Certain transfers in trust — mortgages — when to be recorded.** Transfers of property in trust for the benefit of creditors and transfers or liens on property by way of mortgage or abstract of such document are required to be recorded in the cases specified in Title 31, chapter 2, on the special relation of debtor and creditor and Title 71 on mortgages, respectively.

**History: En. Sec. 1575, Civ. C. 1895; re-en. Sec. 4648, Rev. C. 1907; re-en. Sec. 6895, R.C.M. 1921; Cal. Civ. C. Sec. 1164; Field Civ. C. Sec. 511; re-en. Sec. 6895, R.C.M. 1935; amd. Sec. 4, Ch. 218, L. 1971; R.C.M. 1947, 73-107.**

**70-21-203. Acknowledgment of instruments required — exceptions.** Before an instrument can be recorded, unless it belongs to the class provided for in either 1-5-108, 1-5-109, 70-21-205, or 70-21-207, its execution must be acknowledged by the person executing it or, if executed by a corporation, by its president, vice-president, secretary or assistant secretary, or other person duly authorized by resolution by such corporation executing the same on behalf of the corporation or proved by a subscribing witness or as provided in 1-5-302 and 1-5-303 and the acknowledgment or proof certified in the manner prescribed by Title 1, chapter 5, parts 1 through 3.

**History: En. Sec. 1573, Civ. C. 1895; re-en. Sec. 4646, Rev. C. 1907; re-en. Sec. 6893, R.C.M. 1921; Cal. Civ. C. Sec. 1161; Based on Field Civ. C. Sec. 509; amd.**

**Sec. 1, Ch. 16, L. 1931; re-en. Sec. 6893, R.C.M. 1935; amd. Sec. 1, Ch. 170, L. 1937; R.C.M. 1947, 73-105.**

**70-21-204. Proof of handwriting acceptable for recording — when.** An instrument proved and certified pursuant to 1-5-302 and 1-5-303 may be recorded in the proper office if the original is at the same time deposited therein to remain for public inspection, but not otherwise.

**History: En. Sec. 1574, Civ. C. 1895; re-en. Sec. 4647, Rev. C. 1907; re-en. Sec. 6894, R.C.M. 1921; Cal. Civ. C. Sec. 1162; Field Civ. C. Sec. 510; re-en. Sec. 6894, R.C.M. 1935; R.C.M. 1947, 73-106.**

**70-21-205. Acknowledgment unnecessary for recording judgments.** Judgments affecting the title to or possession of real property, authenticated by the certificate of the clerk of the court in which such judgments were rendered, may be recorded without acknowledgment or further proof.

**History: En. Sec. 1571, Civ. C. 1895; re-en. Sec. 4644, Rev. C. 1907; re-en. Sec. 6891, R.C.M. 1921; Cal. Civ. C. Sec. 1159; re-en. Sec. 6891, R.C.M. 1935; R.C.M. 1947, 73-102.**

**70-21-206. Recording of return of sale under court decree.** Where real estate is sold under a decree of court, return of such sale shall be made and filed in the office of the clerk of court. The clerk shall record the return so made the same as if it were to an execution wherein a levy upon real estate had been made, provided that where the return contains a true copy of the decree of court under which such sale was made, the clerk shall record all of the return except such copy of the decree and, in lieu of recording such copy, shall insert in the record the following:

"The original judgment and decree, the true copy which is set forth in this return, is recorded in judgment book ...., at pages .... to ...., inclusive, thereof."

**History: En. Sec. 1, Ch. 42, L. 1927; re-en. Sec. 6891.1, R.C.M. 1935; R.C.M. 1947, 73-103.**

**70-21-207. Letters patent and other federal and state documents — recording without acknowledgment.** Letters patent from the United States or from the state of Montana or other documents and instruments or duly certified copies thereof issued by or pursuant to the authority of the United States or the state of Montana which evidence title to land or affect the title thereof, executed and authenticated pursuant to existing law, may be recorded without acknowledgment or further proof; and where letters patent have been lost or are beyond the control of any party deraigning title therefrom or for any reason they remain unrecorded, any person claiming title thereunder may cause a transcript of the copy of such letters patent kept by the government issuing the same, duly certified by the officer or individual having lawful custody of such copy, to be recorded in lieu of the original; and such recorded copy shall have prima facie the same force and effect as the original for title or for evidence until the original letters patent be recorded.

**History: En. Sec. 1572, Civ. C. 1895; re-en. Sec. 4645, Rev. C. 1907; re-en. Sec. 6892, R.C.M. 1921; Cal. Civ. C. Sec. 1160; re-en. Sec. 6892, R.C.M. 1935; amd. Sec. 1, Ch. 148, L. 1957; R.C.M. 1947, 73-104.**

**70-21-208. In what county to be recorded.** Instruments entitled to be recorded must be recorded by the county clerk of the county in which the real property affected thereby is situated.

**History: En. Sec. 1590, Civ. C. 1895; re-en. Sec. 4650, Rev. C. 1907; re-en. Sec. 6898, R.C.M. 1921; Cal. Civ. C. Sec. 1169; Based on Field Civ. C. Sec. 512; re-en. Sec. 6898, R.C.M. 1935; R.C.M. 1947, 73-110.**

**70-21-209. When instrument considered recorded.** An instrument is deemed to be recorded when, being duly acknowledged or proved and certified, it is deposited in the county clerk's office with the proper officer for record.

**History: En. Sec. 1591, Civ. C. 1895; re-en. Sec. 4651, Rev. C. 1907; re-en. Sec. 6899, R.C.M. 1921; Cal. Civ. C. Sec. 1170; Based on Field Civ. C. Sec. 513; re-en. Sec. 6899, R.C.M. 1935; R.C.M. 1947, 73-111.**

**70-21-210. Clerk to endorse fee.** The county clerk must in all cases endorse the amount of his fee for recording on the instrument recorded.

**History: En. Sec. 1576, Civ. C. 1895; re-en. Sec. 4649, Rev. C. 1907; re-en. Sec. 6896, R.C.M. 1921; Cal. Civ. C. Sec. 1165; re-en. Sec. 6896, R.C.M. 1935; R.C.M. 1947, 73-108.**

**70-21-211. Record books to be separate.** Grants absolute in terms are to be recorded in one set of books and mortgages and securities in the nature of mortgages in another.

**History: En. Sec. 1592, Civ. C. 1895; re-en. Sec. 4652, Rev. C. 1907; re-en. Sec. 6900, R.C.M. 1921; Cal. Civ. C. Sec. 1171; re-en. Sec. 6900, R.C.M. 1935; R.C.M. 1947, 73-112.**

**70-21-212. Other duties of recorder — where found.** The duties of county clerks in respect to recording instruments are prescribed by Title 7, chapter 4, part 26.

**History: En. Sec. 1593, Civ. C. 1895; re-en. Sec. 4653, Rev. C. 1907; re-en. Sec. 6901, R.C.M. 1921; Cal. Civ. C. Sec. 1172; Based on Field Civ. C. Sec. 514; re-en. Sec. 6901, R.C.M. 1935; R.C.M. 1947, 73-113.**

## Part 3

## Effect of Recording

**70-21-301. Conveyance defined.** The term "conveyance", as used in 70-21-302 through 70-21-304, embraces every instrument in writing by which any estate or interest in real property is created, aliened, mortgaged, or encumbered or by which the title to real property may be affected, except wills.

**History: En. Sec. 1642, Civ. C. 1895; re-en. Sec. 4685, Rev. C. 1907; re-en. Sec. 6936, R.C.M. 1921; Cal. Civ. C. Sec. 1215; Based on Field Civ. C. Sec. 531; re-en. Sec. 6936, R.C.M. 1935; R.C.M. 1947, 73-203.**

**70-21-302. Recording as constructive notice — effect of recording copy in other county.** (1) Every conveyance of real property acknowledged or proved and certified and recorded as prescribed by law, from the time it is filed with the county clerk for record, is constructive notice of the contents thereof to subsequent purchasers and mortgagees.

(2) A certified copy of any such recorded conveyance may be recorded in any other county, and when so recorded the record thereof shall have the same force and effect as though it was of the original conveyance.

**History: En. Sec. 259, 5th Div. Comp. Stat. 1887; re-en. Sec. 1640, Civ. C. 1895; re-en. Sec. 4683, Rev. C. 1907; amd. Sec. 1, Ch. 33, L. 1921; re-en. Sec. 6934, R.C.M. 1921; Cal. Civ. C. Secs. 1213, 1218; re-en. Sec. 6934, R.C.M. 1935; amd. Sec. 1, Ch. 147, L. 1967; R.C.M. 1947, 73-201(part).**

**70-21-303. After-acquired interest — effect on notice.** Further, every conveyance and/or encumbrance of real property acknowledged or proved and certified and recorded as prescribed by law and which is executed by one who thereafter acquires an interest in the real property by a conveyance which said conveyance is constructive notice as aforesaid is, from the time such latter conveyance is filed with the county clerk for record, constructive notice of the contents of such earlier conveyance and/or encumbrance to subsequent takers, purchasers, mortgagees, or other encumbrancers or transferees.

**History: En. Sec. 259, 5th Div. Comp. Stat. 1887; re-en. Sec. 1640, Civ. C. 1895; re-en. Sec. 4683, Rev. C. 1907; amd. Sec. 1, Ch. 33, L. 1921; re-en. Sec. 6934, R.C.M. 1921; Cal. Civ. C. Secs. 1213, 1218; re-en. Sec. 6934, R.C.M. 1935; amd. Sec. 1, Ch. 147, L. 1967; R.C.M. 1947, 73-201(part).**

**70-21-304. Conveyance void as against other conveyance recorded first.** Every conveyance of real property, other than a lease for a term not exceeding 1 year, is void against any subsequent purchaser or encumbrancer, including an assignee of a mortgage, lease, or other conditional estate, of the same property or any part thereof in good faith and for a valuable consideration whose conveyance is first duly recorded.

**History: En. Sec. 260, 5th Div. Comp. Stat. 1887; re-en. Sec. 1641, Civ. C. 1895; re-en. Sec. 4684, Rev. C. 1907; re-en. Sec. 6935, R.C.M. 1921; Cal. Civ. C. Sec. 1214; Based on Field Civ. C. Sec. 530; re-en. Sec. 6935, R.C.M. 1935; R.C.M. 1947, 73-202.**

**70-21-305. Abstract of conveyance — effect of recording.** An abstract of a conveyance or encumbrance of real property, which abstract is acknowledged or proved and certified and recorded as prescribed by law, shall have the same effect for all purposes of this part as if the conveyance or encumbrance of real property had been acknowledged or proved and certified and recorded as prescribed by law.

**History: En. Sec. 3, Ch. 218, L. 1971; R.C.M. 1947, 73-201.1.**

**70-21-306. Recording judgments to impart notice.** Every certified copy of a judgment of partition or any other judgment, filed and recorded as provided in 7-4-2613, from the time of filing the same for record imparts notice to all persons of the contents thereof, and subsequent purchasers, mortgagees, and lienholders purchase and take with like notice and effect as if such property or judgment was a duly recorded deed, grant, or transfer.

**History: En. Sec. 4415, Pol. C. 1895; re-en. Sec. 3036, Rev. C. 1907; re-en. Sec. 4802, R.C.M. 1921; Cal. Pol. C. Sec. 4239; re-en. Sec. 4802, R.C.M. 1935; R.C.M. 1947, 16-2908.**

**70-21-307. Effect of conveyance to grantee as trustee when no trust conditions provided.** Any conveyance of real property hereafter placed of record in any office of any county clerk and recorder in which the name of the grantee is followed by the word "trustee", "as trustee", or some similar fiduciary term and in which no terms and conditions of such purported trust or any limitation on the power of the grantee to convey shall be set forth so that any person dealing with such real property could learn therefrom what, if any, limitation exists upon the authority of the grantee with regard to the reconveyance or encumbrance of such property shall be considered as though such property had been conveyed to such grantee without any limitation upon his authority to reconvey or encumber as fully as though the word "trustee", "as trustee", or any equivalent fiduciary expression had not been used in connection with his name, and the use of the word "trustee" or "as trustee" or any equivalent fiduciary expression purporting a trust contained in such conveyance shall have no force or effect in charging any purchaser or encumbrancer thereof with notice of any limitation of power on the part of the person so named as trustee to deal with such lands as his own.

**History: En. Sec. 1, Ch. 64, L. 1943; R.C.M. 1947, 73-206.**

**70-21-308. Power of attorney contained in recorded instrument — how revoked.** No instrument containing a power to convey or execute instruments affecting real property, which has been recorded, is revoked by any act of the party by whom it was executed unless the instrument containing such revocation is also acknowledged or proved, certified, and recorded in the same office in which the instrument containing the power was recorded.

**History: En. Sec. 1643, Civ. C. 1895; re-en. Sec. 4686, Rev. C. 1907; re-en. Sec. 6937, R.C.M. 1921; Cal. Civ. C. Sec. 1216; Based on Field Civ. C. Sec. 532; re-en. Sec. 6937, R.C.M. 1935; R.C.M. 1947, 73-204.**

**70-21-309. Validation of conveyances recorded after defective execution — notice imparted.** (1) Any instrument affecting real property, provided no action is now pending to set such instrument aside, which was, previous to January 1, 1973, copied into the proper book kept in the office of the county clerk and recorder shall be deemed to impart after that date notice of its contents to subsequent purchasers and encumbrancers, notwithstanding any defect, omission, or informality in the execution of the instrument or in the certificate of acknowledgment thereof or the absence of any such certificate, and all such instruments acknowledged before July 1, 1973, by the vice-president and assistant secretary of any corporation or by either of them or other person duly authorized by resolution by such corporation executing the same on behalf of the corporation and recorded shall be valid and shall have the same force and effect as though acknowledged by the president or secretary; but nothing herein shall be deemed to affect the rights of purchasers or encumbrancers previous to that date.

(2) Duly certified copies of the record of any such instrument may be read in evidence with like effect as copies of an instrument duly acknowledged and recorded.

**History: En. Sec. 1, Ch. 147, L. 1973; R.C.M. 1947, 73-213.**

**70-21-310. Validation of recorded instruments omitting address of grantee — notice imparted.** (1) Any deed, mortgage, or assignment of mortgage which was, previous to July 1, 1931, copied into the proper book kept in the office of the county clerk and recorder shall be deemed to impart, after July 1, 1931, notice of its contents to subsequent purchasers and encumbrancers notwithstanding the omission therefrom of the post-office address of the grantee, mortgagee, or assignee of the mortgagee, as the case may be; and all such instruments recorded before July 1, 1931, which do not contain the post-office address of the grantee, mortgagee, or assignee of the mortgagee, as the case may be, shall be valid and shall have the same force and effect as though the post-office address of such grantee, mortgagee, or assignee of the mortgagee were contained therein; but nothing herein shall be deemed to affect the rights of purchasers or encumbrancers previous to July 1, 1931.

(2) Duly certified copies of the record of any such instrument may be read in evidence with like effect as certified copies of instruments duly recorded containing the post-office address of the grantee, mortgagee, or assignee of the mortgagee, as the case may be.

**History: En. Sec. 1, Ch. 37, L. 1931; re-en. Sec. 6933.1, R.C.M. 1935; R.C.M. 1947, 39-132.**

# CHAPTER 22

# CORNER RECORDATION ACT SURVEYS AND COORDINATES

### Part 1 — Corner Recordation Act

Section

70-22-101. Short title.
70-22-102. Purpose.
70-22-103. Definitions.
70-22-104. Filing of corner record required.
70-22-105. Filing permitted as to any corner or accessory.
70-22-106. Filing of records on corners established before effective date.
70-22-107. Form and contents of record — board to prescribe.
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70-22-109. Duties of county clerk — fee.
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### Part 2 — Montana Coordinate System

70-22-201. Coordinate system adopted — designation — division of state into zones.
70-22-202. Designation of system by zone.
70-22-203. Use of x- and y-coordinates.
70-22-204. Description of tract lying across zone boundaries.
70-22-205. Technical description of zones — stations marked on ground.
70-22-206. Proximity to station required for use of coordinates in recorded instrument.
70-22-207. Use of term Montana coordinate system limited.
70-22-208. Public land survey description to prevail.
70-22-209. Purchaser or mortgagee not required to rely on description using system.

## Part 1

## Corner Recordation Act

**70-22-101. Short title.** This part may be cited as the "Corner Recordation Act of Montana".

**History: En. Sec. 1, Ch. 202, L. 1963; R.C.M. 1947, 67-2001.**

**70-22-102. Purpose.** It is the purpose of this part to protect and perpetuate public land survey corners and information concerning the location of such corners by requiring the systematic establishment of monuments and recording of information concerning the marking of the location of such public land survey corners and to allow the systematic location of other property corners thereby providing for property security and a coherent system of property location and identification of ownerships and thereby eliminating the repeated necessity for reestablishment and relocations of such corners where once they are established and located.

**History: En. Sec. 2, Ch. 202, L. 1963; R.C.M. 1947, 67-2002.**

**70-22-103. Definitions.** Except where the context indicates a different meaning, terms used in this part shall be defined as follows:

(1) A "property corner" is a geographic point on the surface of the earth and is on, a part of, and controls a property line.

(2) A "property controlling corner" for a property is a public land survey corner or any property corner which does not lie on a property line of the property in question but which controls the location of one or more of the property corners of the property in question.

(3) A "public land survey corner" is any corner actually established and monumented in an original survey or resurvey used as a basis of legal description for issuing a patent for the land to a private person from the United States government.

(4) A "corner", unless otherwise qualified, means a property corner or a property controlling corner or a public land survey corner or any combination of these.

(5) An "accessory to a corner" is any exclusively identifiable physical object whose spatial relationship to the corner is recorded. Accessories may be bearing trees, bearing objects, monuments, reference monuments, line trees, pits, mounds, charcoal-filled bottles, steel or wooden stakes, or other objects.

(6) A "monument" is an accessory that is presumed to occupy the exact position of a corner.

(7) A "reference monument" is a special monument that does not occupy the same geographical position as the corner itself but whose spatial relationship to the corner is recorded and which serves to witness the corner.

(8) A "registered surveyor" is a surveyor who is registered to practice land surveying under Title 37, chapter 67, and has a paid-up license for that calendar year or who is authorized under Title 37, chapter 67, to practice land surveying.

(9) The "board" is the board of professional engineers and land surveyors, provided for in 2-15-1653.

**History: En. Sec. 3, Ch. 202, L. 1963; amd. Sec. 320, Ch. 350, L. 1974; R.C.M. 1947, 67-2003.**

**70-22-104. Filing of corner record required.** A surveyor shall complete, sign, stamp with his seal, and file with the county clerk and recorder of the county where the corner is situated a written record of corner establishment or restoration to be known as a "corner record" for every public land survey corner and accessory to such corner which is established, reestablished, monumented, remonumented, restored, rehabilitated, perpetuated, or used as control in any survey by such surveyor and within 90 days thereafter unless the corner and its accessories are substantially as described in an existing corner record filed in accordance with the provisions of this part.

**History: En. Sec. 4, Ch. 202, L. 1963; R.C.M. 1947, 67-2004.**

**70-22-105. Filing permitted as to any corner or accessory.** A surveyor may file such corner record as to any property corner, property controlling corner, reference monument, or accessory to a corner.

**History: En. Sec. 5, Ch. 202, L. 1963; R.C.M. 1947, 67-2005.**

**70-22-106. Filing of records on corners established before effective date.** Corner records may be filed concerning corners established, reestablished, or restored before July 1, 1963.

**History: En. Sec. 10, Ch. 202, L. 1963; R.C.M. 1947, 67-2010.**

**70-22-107. Form and contents of record — board to prescribe.** The board shall by regulation provide and prescribe the information which shall be necessary to be included in the corner record, and the board shall prescribe the form in which such corner record shall be presented and filed.

**History: En. Sec. 6, Ch. 202, L. 1963; R.C.M. 1947, 67-2006.**

**70-22-108. Corner records to be certified.** No corner record shall be filed unless the same is signed by a registered surveyor and stamped with his seal, or in the case of an agency of the United States government or the state of Montana, the certificate may be signed by the survey party chief making the survey and approved, signed, and sealed by the registered surveyor in responsible charge of the agency.

**History: En. Sec. 9, Ch. 202, L. 1963; R.C.M. 1947, 67-2009.**

**70-22-109. Duties of county clerk — fee.** (1) The county clerk and recorder of the county containing the corner shall receive the completed corner record and preserve it in a hardbound book. The books shall be numbered in numerical order as filled.

(2) The clerk shall number the forms in numerical order as they are filed.

(3) The book and page number in which the corner record is filed shall be placed by the clerk near that same corner on a cross-index plat which the clerk shall provide for such a purpose.

(4) The county clerk and recorder shall make these records available for public inspection during all usual office hours.

(5) For purposes of determining the filing fee hereunder, the corner record shall be considered as a similar service to recording a townsite map of one lot.

**History: En. Sec. 7, Ch. 202, L. 1963; R.C.M. 1947, 67-2007.**

**70-22-110. Surveyor to rehabilitate monument.** In every case where a corner record of a public land survey corner is required to be filed under the provisions of this part, the surveyor must reconstruct or rehabilitate the monument of such corner and accessories to such corner so that the same shall be left by him in such physical condition that it remains as permanent a monument as is reasonably possible and so that the same may be reasonably expected to be located with facility at all times in the future.

**History: En. Sec. 8, Ch. 202, L. 1963; R.C.M. 1947, 67-2008.**

## Part 2

## Montana Coordinate System

**70-22-201. Coordinate system adopted — designation — division of state into zones.** (1) The system of plane coordinates which has been established by the United States coast and geodetic survey for defining and stating the positions or locations of points on the surface of the earth within the state of Montana is hereafter to be known and designated as the "Montana coordinate system".

(2) For the purpose of the use of this system, the state is divided into a north zone and a central zone and a south zone.

(3) The area now included in the following counties shall constitute the north zone: Blaine, Chouteau, Daniels, Flathead, Glacier, Hill, Liberty, Lincoln, Phillips, Pondera, Roosevelt, Sheridan, Teton, Toole, and Valley.

(4) The area now included in the following counties shall constitute the central zone: Cascade, Dawson, Fergus, Garfield, Judith Basin, Lake, Lewis and Clark, McCone, Meagher, Mineral, Missoula, Petroleum, Powell, Prairie, Richland, Sanders, and Wibaux.

(5) The area now included in the following counties shall constitute the south zone: Beaverhead, Big Horn, Broadwater, Carbon, Carter, Custer, Deer Lodge, Fallon, Gallatin, Golden Valley, Granite, Jefferson, Madison, Musselshell, Park,

Powder River, Ravalli, Rosebud, Silver Bow, Stillwater, Sweet Grass, Treasure, Wheatland, and Yellowstone.

**History: En. Sec. 1, Ch. 232, L. 1965; amd. Sec. 1, Ch. 73, L. 1975; R.C.M. 1947, 67-2011.**

**70-22-202. Designation of system by zone.** (1) As established for use in the north zone, the Montana coordinate system shall be named and in any land description in which it is used it shall be designated the "Montana coordinate system, north zone".

(2) As established for use in the central zone, the Montana coordinate system shall be named and in any land description in which it is used it shall be designated the "Montana coordinate system, central zone".

(3) As established for use in the south zone, the Montana coordinate system shall be named and in any land description in which it is used it shall be designated the "Montana coordinate system, south zone".

**History: En. Sec. 2, Ch. 232, L. 1965; R.C.M. 1947, 67-2012.**

**70-22-203. Use of x- and y-coordinates.** The plane coordinates of a point on the earth's surface to be used in expressing the position or location of such point in the appropriate zone of this system shall consist of two distances expressed in feet and decimals of a foot. One of these distances, to be known as the "x-coordinate", shall give the position in an east-and-west direction; the other, to be known as the "y-coordinate", shall give the position in a north-and-south direction. These coordinates shall be made to depend upon and conform to the coordinates on the Montana coordinate system of the triangulation and traverse stations of the United States coast and geodetic survey within the state of Montana as those coordinates have been determined by the survey.

**History: En. Sec. 3, Ch. 232, L. 1965; R.C.M. 1947, 67-2013.**

**70-22-204. Description of tract lying across zone boundaries.** When any tract of land to be defined by a single description extends from one into another of the above coordinate zones, the positions of all points on its boundaries may be referred to either of such zones, the zone which is used being specifically named in the description.

**History: En. Sec. 4, Ch. 232, L. 1965; R.C.M. 1947, 67-2014.**

**70-22-205. Technical description of zones — stations marked on ground.** (1) For purposes of more precisely defining the Montana coordinate system, the following description by the United States coast and geodetic survey is adopted:

(a) The Montana coordinate system, north zone, is a Lambert conformal projection of the Clarke spheroid of 1866, having standard parallels at north latitudes 47° 51′ and 48° 43′, along which parallels the scale shall be exact. The origin of coordinates is at the intersection of the meridian 109° 30′ west of Greenwich and the parallel 44° 00′ north latitude. This origin is given the coordinates: $x = 2,000,000$ feet and $y = 0$ feet.

(b) The Montana coordinate system, central zone, is a Lambert conformal projection of the Clarke spheroid of 1866, having standard parallels at north latitudes 46° 27′ and 47° 53′, along which parallels the scale shall be exact. The origin of coordinates is at the intersection of the meridian 109° 30′ west of Greenwich and the parallel 45° 50′ north latitude. This origin is given the coordinates: $x = 2,000,000$ feet and $y = 0$ feet.

(c) The Montana coordinate system, south zone, is a Lambert conformal projection of the Clarke spheroid of 1866, having standard parallels at north latitudes 44° 52′ and 46° 24′, along which parallels the scale shall be exact. The origin of coordinates is at the intersection of the meridian 109° 30′ west of Greenwich and the parallel 47° 00′ north latitude. This origin is given the coordinates: x = 2,000,000 feet and y = 0 feet.

(2) The position of the Montana coordinate system shall be as marked on the ground by triangulation or traverse stations established in conformity with the standards adopted by the United States coast and geodetic survey for first-order and second-order work, whose positions have been rigidly adjusted on the North American datum of 1927 and whose coordinates have been computed on the system herein defined. Any such station may be used for establishing a survey connection with the Montana coordinate system.

**History: En. Sec. 5, Ch. 232, L. 1965; amd. Sec. 2, Ch. 73, L. 1975; R.C.M. 1947, 67-2015.**

**70-22-206. Proximity to station required for use of coordinates in recorded instrument.** No coordinates based on the Montana coordinate system purporting to define the position of a point on a land boundary shall be presented to be recorded in any public land records or deed records unless such point is within one-half mile of a triangulation or traverse station established in conformity with the standards prescribed in 70-22-205, provided that said one-half mile limitation may be modified by a duly authorized state agency to meet local conditions.

**History: En. Sec. 6, Ch. 232, L. 1965; R.C.M. 1947, 67-2016.**

**70-22-207. Use of term Montana coordinate system limited.** The use of the term "Montana coordinate system" on a map, report of survey, or other document shall be limited to coordinates based on the Montana coordinate system as defined in this part.

**History: En. Sec. 7, Ch. 232, L. 1965; R.C.M. 1947, 67-2017.**

**70-22-208. Public land survey description to prevail.** Whenever coordinates based on the Montana coordinate system are used to describe any tract of land which in the same document is also described by reference to any subdivision, line, or corner of the United States public land surveys, the description by coordinates shall be construed as supplemental to the basic description of such subdivision, line, or corner contained in the official plats and field notes filed of record, and in the event of any conflict, the description by reference to the subdivision, line, or corner of the United States public land surveys shall prevail over the description by coordinates.

**History: En. Sec. 8, Ch. 232, L. 1965; R.C.M. 1947, 67-2018.**

**70-22-209. Purchaser or mortgagee not required to rely on description using system.** Nothing contained in this part shall require any purchaser or mortgagee to rely on a description, any part of which depends exclusively upon the Montana coordinate system.

**History: En. Sec. 9, Ch. 232, L. 1965; R.C.M. 1947, 67-2019.**

# CHAPTER 23

## UNIT OWNERSHIP ACT — CONDOMINIUMS

### Part 1 — General Provisions

Section
70-23-101. Short title.
70-23-102. Definitions.

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## Part 1

## General Provisions

**70-23-101. Short title.** This chapter may be cited as the "Unit Ownership Act".

**History: En. Sec. 1, Ch. 120, L. 1965; R.C.M. 1947, 67-2301.**

**70-23-102. Definitions.** In this chapter, unless the context requires otherwise, the following definitions apply:

(1) "Association of unit owners" means all the unit owners acting as a group in accordance with the declaration and bylaws.

(2) "Building" means a multiple-unit building or buildings comprising a part of the property.

(3) "Common elements" means the general common elements and the limited common elements.

(4) "Common expenses" means:

(a) expenses of administration, maintenance, repair, or replacement of the common elements;

(b) expenses agreed upon as common by all the unit owners; and

(c) expenses declared common by 70-23-610 and 70-23-612 or by the declaration or the bylaws of the particular condominium.

(5) "Condominium" means the ownership of single units with common elements located on property submitted to the provisions of this chapter.

(6) "Declaration" means the instrument by which the property is submitted to the provisions of this chapter.

(7) "Department" means the department of business regulation.

(8) "General common elements", unless otherwise provided in a declaration or by consent of all the unit owners, means:

(a) the land on which the building is located, except any portion thereof included in a unit or made a limited common element by the declaration;

(b) the foundations, columns, girders, beams, supports, mainwalls, roofs, halls, corridors, lobbies, stairs, fire escapes, entrances, and exits of the building;

(c) the basements, yards, gardens, parking areas, and outside storage spaces, private pathways, sidewalks, and private roads;

(d) installations of central services such as power, light, gas, hot and cold water, heating, refrigeration, air conditioning, waste disposal, and incinerating;

(e) the elevators, tanks, pumps, motors, fans, compressors, ducts, and in general all apparatus and installations existing for common use;

(f) the premises for the lodging of janitors or caretakers of the property; and

(g) all other elements of the building necessary or convenient to its existence, maintenance, and safety or normally in common use.

(9) "Limited common elements" means those common elements designated in the declaration or by agreement of all the unit owners as reserved for the use of a certain unit or number of units to the exclusion of the other units.

(10) "Majority" or "majority of the unit owners", unless otherwise provided in the declaration, means the owners of more than 50% in the aggregate of the undivided ownership interests in the general common elements as the percentage of interest in such element appertaining to each unit is expressed in the declaration. Whenever a percentage of the unit owners is specified, percentage means such percentage in the aggregate of such undivided ownership.

(11) "Manager" means the manager, board of managers, or other person in charge of the administration of or managing the property.

(12) "Project" means a real estate condominium project, a plan whereby a condominium of two or more units located on property submitted to the provisions of this chapter are offered or proposed to be offered for sale.

(13) "Property" means the land, all buildings, improvements, and structures thereon and all easements, rights, and appurtenances belonging thereto which are submitted to the provisions of this chapter.

(14) "Recording officer" means the county officer charged with the duty of filing and recording deeds and mortgages or any other instruments or documents affecting the title to real property.

(15) "Unit" means a part of the property including one or more rooms occupying one or more floors or a part or parts thereof intended for any type of independent use and with a direct exit to a public street or highway or to a common area or area leading to a public street or highway.

(16) "Unit designation" means the number, letter, or combination thereof designating a unit in the declaration.

(17) "Unit owner" means the person owning a unit in fee simple absolute individually or as co-owner in any real estate tenancy relationship recognized under the laws of this state. However, for all purposes, including the exercise of voting rights, provided by lease filed with the presiding officer of the association of unit owners, a lessee of a unit shall be considered a unit owner.

**History: En. Sec. 2, Ch. 120, L. 1965; amd. Sec. 1, Ch. 150, L. 1973; R.C.M. 1947, 67-2302.**

**70-23-103. Applicability — submission by declaration required.** In order to submit any property to the provisions of this chapter, the sole owner or sole lessee or all of the owners or all of the lessees thereof shall execute, acknowledge, and record a declaration in the office of the recording officer of the county in which the property is located. The declaration shall be executed in accordance with 70-23-301.

**History: En. Sec. 3, Ch. 120, L. 1965; amd. Sec. 2, Ch. 150, L. 1973; R.C.M. 1947, 67-2303.**

## Part 2

## Regulation of Unit Sales Prior to Construction

**70-23-201. Disposition of funds from purchase or lease of unit prior to completion of construction.** (1) If units are conveyed or leased prior to the completion of construction of the building within which such unit is located and all of the general common elements of the project (except those general common elements forming a part of a separate building enclosing other units) as set forth in the declaration filed pursuant to 70-23-301, all moneys from the sale of the units including any payments made on loan commitments from lending institutions shall be deposited in escrow by the developer in a fund with a bank, savings and loan association, or company authorized to do business in the state under an escrow arrangement.

(2) No disbursements may be made from such fund until the completion of the building and general common elements or until compliance with the provisions of 70-23-202 through 70-23-206, whichever comes first.

(3) If no disbursements are made until after the building and general common elements have been completed, the developer need not comply with 70-23-202 through 70-23-206.

(4) If 70-23-202 through 70-23-206 have been complied with, disbursements from such fund may be made from time to time to pay for construction costs of the building in proportion to the valuation of the work completed by the contractor as certified by a registered architect or registered professional engineer and for architectural, engineering, finance, and legal fees and for other incidental expenses of the condominium project as approved by the mortgagee. The balance of the moneys remaining in the fund shall be disbursed only upon completion of the building, free and clear of all mechanic's and materialman's liens. The department may impose other restrictions relative to the retention and disbursement of the fund.

**History: En. 67-2303.1 by Sec. 3, Ch. 150, L. 1973; R.C.M. 1947, 67-2303.1.**

**70-23-202. Notice of intention to sell by developer — fees.** (1) The developer of a project shall notify the department in writing prior to the time the project or units thereof are to be offered for sale.

(2) The notice of intention to sell shall fully disclose all material facts on a form prescribed by the department.

(3) The fee for filing the notice of intention is $50. For the inspection of the project and examination of the accounts and records of the developer, the department may require the developer to pay the costs thereof, not to exceed the sum of $100 for each day actually required to perform such duties, but in no event shall the total charges exceed the sum of $500.

**History: En. 67-2303.2 by Sec. 4, Ch. 150, L. 1973; R.C.M. 1947, 67-2303.2.**

**70-23-203. Examination of project by department after notice of intent to sell — report.** (1) After receipt of the notice of intention to sell, the department shall inspect the project and examine the accounts and records of the developer.

(2) The department shall make a report of its inspection which shall contain all material facts reasonably available and which shall be on file and available for public inspection in the office of the director.

(3) The department may issue a preliminary report if the notice of intention is incomplete in some respect but the department is satisfied that the report will ade-

quately disclose all material facts which a prospective purchaser should consider and that adequate protection for purchasers' funds has been provided.

(4) A developer may not use a preliminary report to contract for the sale of a unit unless he files the notice of intention to sell, a specimen copy of the proposed contract of sale, and an executed copy of an escrow agreement with a depository in accordance with 70-23-201.

**History: En. 67-2303.3 by Sec. 5, Ch. 150, L. 1973; R.C.M. 1947, 67-2303.3.**

**70-23-204. Refund of purchasers' funds for change in building plans — final report.** (1) Purchasers' funds obtained prior to issuance of final reports shall be refunded if there is any change in the condominium building plans subsequent to execution of the contract requiring approval of a city or county officer having jurisdiction over issuance of permits for construction of buildings unless purchaser's written acceptance of the specific change is obtained.

(2) Rights under contracts of sale of condominium units under a preliminary report are not enforceable against purchasers until purchasers have had a full opportunity to read the department's final report on the project and to obtain a refund of any moneys paid as well as a release from all obligations if the final report differs in any material respect from the preliminary report.

(3) If the final report is not issued within 1 year from the date of issuance of the preliminary report, purchasers are entitled to refund of all moneys paid by the purchasers thereunder without further obligation.

**History: En. 67-2303.4 by Sec. 6, Ch. 150, L. 1973; R.C.M. 1947, 67-2303.4.**

**70-23-205. Final report prior to completion of project — supplementary report.** (1) The department may not issue a final report prior to completion of construction of a project unless:

(a) there is filed with the department:

(i) a verified statement showing all costs involved in completing the project, including land, ground lease payments, and equipment lease payments, real property taxes, construction costs, architect, engineering, and attorneys' fees, financing costs, provisions for contingency, and other costs which must be paid on or before the completion of construction of the building;

(ii) a verified estimate of the time of completion of construction of the total project;

(iii) satisfactory evidence of sufficient funds to cover the total project cost from purchasers' funds, equity funds, interim or permanent loan commitments, or other sources;

(iv) a copy of the executed construction contract;

(v) satisfactory evidence of a performance bond of not less than 100% of the cost of construction with a reliable surety company;

(vi) if purchasers' funds are to be used for construction, an executed copy of the escrow agreement for the escrow fund required under 70-23-201 for financing construction, which shall expressly provide for:

(A) no disbursements by the escrow agent for payment of construction costs unless bills are submitted with the request for such disbursements which have been approved or certified for payment by the mortgagee or a financially disinterested person; and

(B) no disbursements from the balance of the escrow fund after payment of construction costs pursuant to subsection (A) until the escrow agent receives satisfactory evidence that all mechanics' and materialmen's liens have been cleared, unless sufficient funds are set aside for any bona fide dispute;

(b) the declaration provided for in 70-23-301 has been filed.

(2) If after a final report has been issued any circumstance occurs which would render the final report misleading as to purchasers or if the developer proposes to

materially change the project, the developer shall stop all sales and immediately submit sufficient information to the department to enable it to issue a supplementary report describing the changes. Sales shall not resume until the supplementary report has been issued.

**History: En. 67-2303.5 by Sec. 7, Ch. 150, L. 1973; R.C.M. 1947, 67-2303.5.**

**70-23-206. No binding contract until purchaser has received final report.** (1) The developer or any other person offering any unit in a condominium project prior to completion of its construction shall not enter into a binding contract or agreement for the sale or resale thereof until:

(a) a true copy of the department's final report thereon with all supplementary reports has been given to the prospective purchaser;

(b) the prospective purchaser has been given an opportunity to read the reports; and

(c) the prospective purchaser executes a receipt for the reports.

(2) Receipts taken for any report shall be kept on file in possession of the developer, subject to inspection at a reasonable time by the department for a period of 3 years from the date the receipt was taken.

**History: En. 67-2303.6 by Sec. 8, Ch. 150, L. 1973; R.C.M. 1947, 67-2303.6.**

## Part 3

## Creation — Declaration and Bylaws

**70-23-301. Contents of declaration.** A declaration shall contain:

(1) a description of the land, whether leased or in fee simple, on which the building is or is to be located;

(2) the name by which the property shall be known and a general description of the building, including the number of stories and basements, the number of units, and the principal materials of which it is constructed;

(3) the unit designation, location, approximate area of each unit, and any other data necessary for proper identification;

(4) a description of the general common elements and the percentage of the interest of each unit owner therein;

(5) a description of the limited common elements, if any, stating to which units their use is reserved and in what percentage;

(6) a statement of the use for which the building and each of the units is intended;

(7) the name of a person to receive service of process in the cases provided in 70-23-901 and the residence or place of business of such person which shall be within the county in which the property is located;

(8) any other details regarding the property that the person executing the declaration considers desirable.

**History: En. Sec. 14, Ch. 120, L. 1965; amd. Sec. 11, Ch. 150, L. 1973; R.C.M. 1947, 67-2314.**

**70-23-302. Preliminary declaration.** A preliminary declaration, setting forth as many of the particulars required by 70-23-301 as may then be practicable, may be recorded before construction of the building described in the declaration is completed. The preliminary declaration shall not relieve the owner from the necessity of filing the declaration as required by 70-23-301.

**History: En. Sec. 15, Ch. 120, L. 1965; R.C.M. 1947, 67-2315.**

**70-23-303. Name of property — similarity prohibited.** No property shall bear a name using a word which is the same as, similar to, or pronounced the same as a word in the name of any other property or subdivision in the same county, except for the words "apartment", "motel", "building", "court", "place", or similar words.

**History: En. Sec. 16, Ch. 120, L. 1965; R.C.M. 1947, 67-2316.**

**70-23-304. Declaration to be approved by department of revenue before recording.** Before a declaration may be recorded, it must be approved by the agent of the department of revenue in the county in which the property is located. No declaration shall be approved unless:

(1) the name is proper so as to comply with 70-23-303; and

(2) all taxes and assessments due and payable have been paid.

**History: En. Sec. 17, Ch. 120, L. 1965; amd. Sec. 40, Ch. 391, L. 1973; R.C.M. 1947, 67-2317.**

**70-23-305. Recording of declaration.** (1) When a declaration is made and approved as required, it shall, upon the payment of the fees provided by law, be recorded by the recording officer. The fact of recording and the date thereof shall be entered thereon.

(2) At the time of recording a declaration, the person offering it for record shall also file an exact copy, certified by the recording officer to be a true copy thereof, with the department of revenue or its agent in the county in which the property is located.

**History: En. Sec. 18, Ch. 120, L. 1965; amd. Sec. 41, Ch. 391, L. 1973; R.C.M. 1947, 67-2318.**

**70-23-306. Floor plans recorded with declaration — certification.** (1) Floor plans of the building described in a declaration shall be recorded simultaneously with the declaration. The floor plans shall show the layout of each unit, including the unit designation, location and dimensions of each unit, and the common areas to which each has access.

(2) There shall be attached to the floor plans a statement of the registered architect or registered professional engineer who prepared the floor plans, certifying that the plans are an accurate copy of the plans filed with and approved by the city and county officers having jurisdiction to issue building permits. If the plans do not include a verified statement by the architect or engineer that the plans fully and accurately depict the layout, location, unit designation, and dimensions of each unit as built, there shall be recorded within 30 days from the date of completion of the building or from the date of the first occupancy of the building, whichever first occurs, an amendment to the declaration to which shall be attached a verified statement of a registered architect or registered professional engineer certifying that the floor plans previously filed or being filed simultaneously with the amendment fully and accurately depict the layout of the units and floors of the building and the date construction of the building was completed.

**History: En. Sec. 19, Ch. 120, L. 1965; amd. Sec. 12, Ch. 150, L. 1973; R.C.M. 1947, 67-2319.**

**70-23-307. Bylaws — adoption, recording, and amendment.** (1) The unit owners of each property shall adopt bylaws to govern the administration of the property.

(2) A copy of the bylaws, certified by the presiding officer and secretary of the association, shall be recorded simultaneously with the declaration of the property to which the bylaws relate.

(3) An amendment of the bylaws shall not be effective unless approved by 75% of the unit owners and until a copy of the bylaws, as amended, certified by the presiding officer and secretary of the association of unit owners, is recorded.

**History: En. Sec. 20, Ch. 120, L. 1965; R.C.M. 1947, 67-2320.**

**70-23-308. Contents of bylaws.** The bylaws shall provide for:

(1) the election from among the unit owners of a board of directors, the number of persons constituting the board, and that the terms of at least one-third of the directors shall expire annually; the powers and duties of the board; the compensation, if any, of the directors; the method of removal from office of the directors; and whether or not the board may engage the services of a manager or managing agent;

(2) the method of calling meetings of the unit owners and the percentage, if other than a majority as defined by 70-23-102(10), that shall constitute a quorum;

(3) the election of a chairman, a secretary, and a treasurer;

(4) the maintenance, upkeep, and repair of the common elements and payment for the expense thereof, including the method of approving payment vouchers;

(5) the employment of personnel necessary for the maintenance, upkeep, and repair of the common elements;

(6) the manner of collecting from the unit owners their share of the common expenses;

(7) the method of adopting and of amending administrative rules governing the details of the operation and use of the common elements;

(8) such restrictions on and requirements respecting the use and maintenance of the units and the use of the common elements, not included in the declaration, as are designed to prevent unreasonable interference with the use of their respective units and of the common elements by the several unit owners;

(9) the method of amending the bylaws subject to 70-23-307.

**History: En. Sec. 21, Ch. 120, L. 1965; R.C.M. 1947, 67-2321.**

## Part 4

## Nature of the Ownership Interest

**70-23-401. Property status of the unit.** While the property is submitted to this chapter, a unit in the building may be individually conveyed, leased, or encumbered and may be the subject of ownership, possession, or sale and of all types of juridic acts inter vivos or mortis causa as if it were sole and entirely independent of the other units in the building of which they form a part, and the corresponding individual titles and interests shall be recordable.

**History: En. Sec. 4, Ch. 120, L. 1965; amd. Sec. 9, Ch. 150, L. 1973; R.C.M. 1947, 67-2304.**

**70-23-402. Exclusive ownership and possession of unit — joint ownership.** (1) Each unit owner shall be entitled to the exclusive ownership and possession of his unit.

(2) A unit may be jointly or commonly owned by more than one person.

**History: En. Sec. 5, Ch. 120, L. 1965; amd. Sec. 10, Ch. 150, L. 1973; R.C.M. 1947, 67-2305.**

**70-23-403. Common elements — undivided interest of unit owner.** (1) Each unit owner shall be entitled to an undivided interest in the common elements in the percentage expressed in the declaration. Such percentage shall be in the approximate relation that the value of the unit at the date of the declaration bears to the then combined value of all the units having an interest in the particular common elements. Value need not conform to market value.

(2) The percentage of undivided interest of each unit owner in the common elements as expressed in a declaration shall not be altered unless all unit owners having an interest in the particular common element agree thereto and record an amendment to the declaration setting forth the altered percentage of each unit owner having an interest.

**History: En. Sec. 6, Ch. 120, L. 1965; R.C.M. 1947, 67-2306.**

**70-23-404. Common elements — undivided interest to remain attached to unit.** The undivided interest in the common elements shall not be separated from the unit to which it appertains and shall be conveyed or encumbered with the unit even though such interest is not expressly mentioned or described in the conveyance or other instrument.

**History: En. Sec. 7, Ch. 120, L. 1965; R.C.M. 1947, 67-2307(1).**

**70-23-405. Common elements to remain undivided — partition prohibited.** The common elements shall remain undivided, and no unit owner shall bring any action for partition or division of any part thereof except as provided in 70-23-805. Any convenant to the contrary is void.

**History: En. Sec. 7, Ch. 120, L. 1965; R.C.M. 1947, 67-2307(2).**

## Part 5

## Rights and Duties Incidental to Unit Ownership

**70-23-501. Common profits and expenses.** The common profits of the property shall be distributed among and the common expenses shall be charged to the unit owners according to the percentage of undivided interest of each in the common elements.

**History: En. Sec. 8, Ch. 120, L. 1965; R.C.M. 1947, 67-2308.**

**70-23-502. Certain work on unit by owner prohibited.** A unit owner shall make no repair or alteration or perform any other work on his unit which would jeopardize the soundness or safety of the property, reduce the value thereof, or impair any easement or hereditament unless the consent of all the other unit owners affected is first obtained.

**History: En. Sec. 9, Ch. 120, L. 1965; R.C.M. 1947, 67-2309.**

**70-23-503. Common elements — use by unit owner.** Each unit owner may use the common elements in accordance with the purposes for which they are intended but may not hinder or encroach upon the lawful rights of the other unit owners.

**History: En. Sec. 10, Ch. 120, L. 1965; R.C.M. 1947, 67-2310.**

**70-23-504. Maintenance and improvement of common elements.** (1) The necessary work of maintenance, repair, and replacement of the common elements and additions or improvements to the common elements shall be carried out only as provided in the bylaws.

(2) The association of unit owners shall have the right, to be exercised by the manager, to have access to each unit as may be necessary for the maintenance, repair, or replacement of the common elements or to make emergency repairs therein necessary for the public safety or to prevent damage to the common elements or to another unit.

**History: En. Sec. 11, Ch. 120, L. 1965; R.C.M. 1947, 67-2311.**

**70-23-505. Abandonment or waiver of use not to effect exemption.** No unit owner may exempt himself from liability for his contribution towards the common expenses by waiver of the use or enjoyment of any of the common elements or by abandonment of his unit.

**History: En. Sec. 12, Ch. 120, L. 1965; R.C.M. 1947, 67-2312.**

**70-23-506. Compliance with bylaws, rules, and covenants required — action.** Each unit owner shall comply with the bylaws and with the administrative rules adopted pursuant thereto and with the covenants, conditions, and restrictions in the declaration or in the deed to his unit. Failure to comply therewith shall be grounds for an action maintainable by the association of unit owners or by an aggrieved unit owner.

**History: En. Sec. 13, Ch. 120, L. 1965; R.C.M. 1947, 67-2313.**

## Part 6

## Conveyances, Liens, and Common Expenses

**70-23-601. Contents of deed or lease of unit.** The deed or lease of a unit shall contain:

(1) a description of the land, the name of the property, and the recording index numbers and date of recording of the declaration;

(2) the unit designation of the unit;

(3) the use for which the unit is intended;

(4) the percentages of undivided interest in the common elements appertaining to the unit;

(5) any further details the grantor and grantee or lessor and lessee may consider desirable.

**History: En. Sec. 22, Ch. 120, L. 1965; amd. Sec. 13, Ch. 150, L. 1973; R.C.M. 1947, 67-2322.**

**70-23-602. Liens to be satisfied or released at time of first conveyance.** At the time of the first conveyance or lease of each unit following the recording of the declaration, every mortgage and other lien affecting such unit, including the undivided interest of the unit in the common elements, shall be paid and satisfied of record or the unit being conveyed or leased and its interest in the common elements shall be released therefrom by partial release duly recorded.

**History: En. Sec. 23, Ch. 120, L. 1965; amd. Sec. 14, Ch. 150, L. 1973; R.C.M. 1947, 67-2323.**

**70-23-603. Lien allowable against unit not against the property.** Subsequent to recording a declaration and while the property remains subject to this chapter, no lien shall arise or be effective against the property. During such period liens or encumbrances shall arise or be created only against each unit and the undivided interest in the common elements appertaining thereto, in the same manner and under the same conditions as liens or encumbrances may arise or be created upon or against any other separate parcel of real property subject to individual ownership.

**History: En. Sec. 24, Ch. 120, L. 1965; R.C.M. 1947, 67-2324(1).**

**70-23-604. Mechanic's or materialman's lien — no effect on nonconsenting owner — exception.** No labor performed or materials furnished with the consent or at the request of a unit owner, his agent, contractor, or subcontractor shall be the basis for the filing of a mechanic's or materialman's lien against the unit of any other unit owner not consenting to or requesting the labor to be performed or the materials to be furnished, except that consent shall be considered given by the owner of any unit in the case of emergency repairs thereto performed or furnished with the consent or at the request of the manager.

**History: En. Sec. 24, Ch. 120, L. 1965; R.C.M. 1947, 67-2324(2).**

**70-23-605. Lien effective against two or more units — release from.** If a lien becomes effective against two or more units, the owner of each unit subject to such a lien shall have the right to have his unit released from the lien by payment of the amount of the lien attributable to his unit. The amount of the lien attributable to a unit and the payment required to satisfy such a lien, in the absence of agreement, shall be determined by application of the percentage established in the declaration. Such partial payment, satisfaction, or discharge shall not prevent the lienor from proceeding to enforce his rights against any unit and the undivided interest in the common element appertaining thereto not so released by payment, satisfaction, or discharge.

**History: En. Sec. 24, Ch. 120, L. 1965; R.C.M. 1947, 67-2324(3).**

**70-23-606. Records of receipts and expenditures affecting common elements — inspection.** (1) The manager shall keep detailed accurate records in chronological order of the receipts and expenditures affecting the common elements, itemizing the maintenance and repair expenses of the common elements and any other expenses incurred.

(2) Such records and the vouchers authorizing the payments shall be available for examination by the unit owners at convenient hours of weekdays.

**History: En. Sec. 25, Ch. 120, L. 1965; R.C.M. 1947, 67-2325.**

**70-23-607. Claim for common expenses — priority of lien — contents — recording.** (1) Whenever an association of unit owners acting through its manager furnishes to a unit any services, labor, or material lawfully chargeable as common expenses, the association of unit owners, upon complying with subsection (2) of this section, shall have a lien upon the individual unit and the undivided interest in the common elements appertaining to such unit for the reasonable value of such common expenses, and the lien shall be prior to all other liens or encumbrances upon the unit except:

(a) tax and assessment liens; and

(b) a first mortgage or trust indenture of record.

(2) An association of unit owners claiming the benefits of subsection (1) of this section shall record in the county in which the unit or some part thereof is located a claim containing:

(a) a true statement of the account due for such common expenses after deducting all just credits and offsets;

(b) the name of the owner of the unit or reputed owner, if known;

(c) a description of the property where the common expenses were furnished and the designation of the unit, sufficient for identification.

(3) The claim shall be verified by the oath of some person having knowledge of the facts and shall be filed with and recorded by the recording officer in the book kept for the purpose of recording liens filed under 71-3-501. The record shall be indexed as deeds and other conveyances are required by law to be indexed.

**History: En. Sec. 26, Ch. 120, L. 1965; R.C.M. 1947, 67-2326.**

**70-23-608. Foreclosure of lien under claim for common expenses — action without foreclosure.** (1) The proceedings to foreclose liens created by 70-23-607 shall conform as nearly as possible to the proceedings to foreclose liens created by 71-3-501. The lien may be enforced by the manager acting on behalf of the association of unit owners.

(2) An action to recover a money judgment for unpaid common expenses may be maintained without foreclosing or waiving the lien securing the claim for common expenses.

**History: En. Sec. 27, Ch. 120, L. 1965; R.C.M. 1947, 67-2327.**

**70-23-609. Foreclosure on unit — payment of rent — purchase of unit by manager.** (1) In any foreclosure suit against a unit, the unit owner shall be required to pay a reasonable rental for the unit if so provided in the bylaws, and the plaintiff in such foreclosure shall be entitled to the appointment of a receiver to collect the rent.

(2) The manager acting on behalf of the unit owners shall have power, unless prohibited by the declaration, to bid in the unit at the foreclosure sale and to acquire and hold, lease, mortgage, and convey the same.

**History: En. Sec. 28, Ch. 120, L. 1965; R.C.M. 1947, 67-2328.**

**70-23-610. Purchaser at foreclosure sale not totally liable for prior common expenses.** Where the purchaser of a unit obtains title to the unit as a result of foreclosure of the first mortgage or trust indenture, such purchaser, his successors, and assigns shall not be liable for any of the common expenses chargeable to such unit which became due prior to the acquisition of title to such unit by such purchaser. Such unpaid share of common expenses shall be a common expense of all the unit owners, including such purchaser, his successors, and assigns.

**History: En. Sec. 29, Ch. 120, L. 1965; R.C.M. 1947, 67-2329.**

**70-23-611. Joint liability of grantor and grantee for unpaid common expenses.** In a voluntary conveyance of a unit, the grantee shall be jointly and severally liable with the grantor for all unpaid charges against the latter for his proportionate share of the common expenses up to the time of the grant or conveyance, without prejudice to the grantee's right to recover from the amounts paid by the grantee therefor. However, upon request of a prospective purchaser, the manager shall make and deliver a statement of the unpaid charges against the prospective grantor, and the grantee in that case shall not be liable for nor shall the unit when conveyed be subject to a lien filed thereafter for any unpaid charges against the grantor in excess of the amount therein set forth.

**History: En. Sec. 30, Ch. 120, L. 1965; R.C.M. 1947, 67-2330.**

**70-23-612. Insurance of building — premiums as common expenses.** (1) The manager as trustee for the unit owners shall, if required by the declaration, the bylaws, or by a majority of the unit owners, insure the building against loss or damage by fire and such other hazards as shall be required, without prejudice to the right of each unit owner to insure his own unit for his own benefit.

(2) The premiums for such insurance on the building are common expenses.

**History: En. Sec. 31, Ch. 120, L. 1965; R.C.M. 1947, 67-2331.**

## Part 7

## Taxation and Exemptions

**70-23-701. Separate taxation.** (1) Each unit with its percentage of undivided interest in the common elements shall be considered a parcel of real property subject to separate assessment and taxation by any taxing unit in like manner as other parcels of real property. Neither the building, the property, nor any of the common elements shall be considered a parcel for purposes of taxation.

(2) In determining the true cash value of a unit with its undivided interest in the common elements, the department of revenue or its agent may use the percentage of undivided interest in the common elements appertaining to a unit as expressed in the declaration.

**History: En. Sec. 40, Ch. 120, L. 1965; amd. Sec. 42, Ch. 391, L. 1973; R.C.M. 1947, 67-2340.**

**70-23-702. Exemptions.** Exemptions from executions and real property taxes apply to the owner of each unit or to the individual units as the case may be.

**History: En. Sec. 41, Ch. 120, L. 1965; R.C.M. 1947, 67-2341.**

**70-23-703. Appraisal and assessment of units — rulemaking.** The department of revenue shall have the authority to make rules prescribing methods best calculated to secure uniformity according to law in the appraisal and assessment of units constituting part of a property submitted to the provisions of this chapter.

**History: En. Sec. 42, Ch. 120, L. 1965; amd. Sec. 43, Ch. 391, L. 1973; R.C.M. 1947, 67-2342.**

## Part 8

## Removal of Property From Unit Ownership Act

**70-23-801. Removal from chapter — recorded instrument — consent of lienholders.** (1) All of the unit owners may remove a property from the provisions of this chapter by executing and recording an instrument to that effect if the holders of all liens affecting any of the units consent thereto or agree, in either case by instruments duly recorded, that their liens be transferred to the undivided interest of the unit owner in the property after removal from the provisions of this chapter.

(2) The tax collector for any taxing unit having a lien for taxes or assessments shall have authority to consent to such a transfer of any tax or assessment lien.

**History: En. Sec. 32, Ch. 120, L. 1965; R.C.M. 1947, 67-2332.**

**70-23-802. Obsolete property — restoration or sale — removal from chapter.** Ninety percent of the unit owners may agree that the property is obsolete in whole or in part and whether or not it shall be renewed and restored or sold and the proceeds of sale distributed. If 90% of the unit owners agree to renew and restore the property, the expense thereof shall be paid by all the unit owners as common expenses. If 90% of the unit owners agree to sell the property, the property shall be considered removed from the provisions of this chapter.

**History: En. Sec. 33, Ch. 120, L. 1965; R.C.M. 1947, 67-2333.**

**70-23-803. Damage to property — decision not to repair or rebuild — removal from chapter.** If within 60 days after the date of the damage to or destruction of all or part of the property the association of unit owners does not decide to repair, reconstruct, or rebuild, the property shall be considered removed from the provisions of this chapter.

**History: En. Sec. 34, Ch. 120, L. 1965; R.C.M. 1947, 67-2334.**

**70-23-804. Effect of removal — ownership in common — liens.** If the property is removed from the provisions of this chapter, as provided by 70-23-801 through 70-23-803, the property shall be considered owned in common by all the unit owners. The percentage of undivided interest of each unit owner in the property owned in common shall be the same as the percentage of undivided interest previously owned by such owner in the common elements. Liens affecting any unit shall be liens, in accordance with the then existing priorities, against the undivided interest of the unit owner in the property owned in common.

**History: En. Sec. 35, Ch. 120, L. 1965; R.C.M. 1947, 67-2335.**

**70-23-805. Effect of removal — subject to partition — sale.** If the property is removed from the provisions of this chapter, as provided in 70-23-801 through 70-23-803, it shall be subject to an action for partition at the suit of any unit owner. The net proceeds of sale, together with the net proceeds of the insurance on the property, if any, shall be considered as one fund and shall be divided among the unit owners in proportion to their respective undivided interests after first paying out of the respective shares of the unit owners, to the extent sufficient for the purpose, all liens on the undivided interest in the property owned by each unit owner.

**History: En. Sec. 36, Ch. 120, L. 1965; R.C.M. 1947, 67-2336.**

**70-23-806. Removal no bar to resubmission.** The removal of the property from the provisions of this chapter shall in no way bar its resubmission.

**History: En. Sec. 37, Ch. 120, L. 1965; R.C.M. 1947, 67-2337.**

## Part 9

## Actions and Process

**70-23-901. Actions — service of process.** (1) Actions may be brought on behalf of two or more of the unit owners, as their respective interests may appear, by the manager with respect to any cause of action relating to the common elements or more than one unit.

(2) Service of process on two or more unit owners, in any action relating to the common elements or more than one unit, may be made on the person designated in the declaration to receive service of process or in duplicate on the recording officer of the county in which the declaration is filed. The recording officer shall promptly send a copy of the document served by certified or registered mail to the person designated in the declaration to receive service of process.

(3) At the time of service on the recording officer, the serving party shall pay to the recording officer a fee of $10 which shall be a taxable disbursement.

**History: En. Sec. 38, Ch. 120, L. 1965; R.C.M. 1947, 67-2338.**

**70-23-902. Change of agent for service of process.** If the association of unit owners wishes to designate a person other than the one named in the declaration to receive service of process in the cases provided in 70-23-901, it shall record an amendment to the declaration. The amendment shall be certified by the presiding officer and the secretary of the association of unit owners and shall state the name of the successor with his residence or place of business as required by 70-23-301(7) and that the person named in the amendment was designated by resolution duly adopted by the association of unit owners.

**History: En. Sec. 39, Ch. 120, L. 1965; R.C.M. 1947, 67-2339.**

## Part 10

## Enforcement and Penalty

**70-23-1001. Investigation by department — injunction.** If the department has satisfactory evidence to indicate that any person has violated any provision of this chapter, it may conduct an investigation and bring an action for injunction.

**History: En. Sec. 15, Ch. 150, L. 1973; R.C.M. 1947, 67-2343.**

**70-23-1002. Penalty.** Any person who violates any provision of this chapter or any rule of the department under such sections is guilty of a misdemeanor and shall be punished by a fine not exceeding $1,000 or by imprisonment for not more than 1 year, or both.

**History: En. Sec. 16, Ch. 150, L. 1973; R.C.M. 1947, 67-2344.**

# CHAPTER 24

# RESIDENTIAL LANDLORD AND TENANT ACT OF 1977

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## Part 1

## General Provisions

**70-24-101. Short title.** This chapter may be cited as "The Montana Residential Landlord and Tenant Act of 1977".

**History: En. 42-401 by Sec. 1, Ch. 313, L. 1977; R.C.M. 1947, 42-401.**

**70-24-102. Purposes — liberal construction to promote.** (1) This chapter shall be liberally construed and applied to promote its underlying purposes and policies.

(2) Underlying purposes and policies of this chapter are to:

(a) simplify, clarify, modernize, and revise the law governing the rental of dwelling units and the rights and obligations of landlords and tenants; and

(b) encourage landlords and tenants to maintain and improve the quality of housing.

**History: En. 42-402 by Sec. 2, Ch. 313, L. 1977; R.C.M. 1947, 42-402.**

**70-24-103. General definitions.** Subject to additional definitions contained in subsequent sections and unless the context otherwise requires, in this chapter the following definitions apply:

(1) "Action" includes recoupment, counterclaim, setoff suit in equity, and any other proceeding in which rights are determined, including an action for possession.

(2) "Dwelling unit" means a structure or the part of a structure that is used as a home, residence, or sleeping place by a person who maintains a household or by two or more persons who maintain a common household. "Dwelling unit", in the case of a person who rents space in a mobile home park but does not rent the mobile home, means the space rented and not the mobile home itself.

(3) "Good faith" means honesty in fact in the conduct of the transaction concerned.

(4) "Landlord" means the owner, lessor, or sublessor of the dwelling unit or the building of which it is a part and also means a manager of the premises who fails to disclose his managerial position.

(5) "Organization" includes a corporation, government, governmental subdivision or agency, business trust, estate, trust, partnership or association, two or more persons having a joint or common interest, and any other legal or commercial entity.

(6) "Owner" means one or more persons, jointly or severally, in whom is vested all or part of:

(a) the legal title to property; or

(b) the beneficial ownership and a right to present use and enjoyment of the premises, including a mortgagee in possession.

(7) "Person" includes an individual or organization.

(8) "Premises" means a dwelling unit and the structure of which it is a part, the facilities and appurtenances therein, and the grounds, areas, and facilities held out for the use of tenants generally or promised for the use of a tenant.

(9) "Rent" means all payments to be made to the landlord under the rental agreement.

(10) "Rental agreement" means all agreements, written or oral, and valid rules adopted under 70-24-311 embodying the terms and conditions concerning the use and occupancy of a dwelling unit and premises.

(11) "Roomer" means a person occupying a dwelling unit that does not include a toilet, a bathtub or a shower, a refrigerator, a stove, or a kitchen sink, all of which are provided by the landlord and one or more of these facilities are used in common by occupants in the structure.

(12) "Single family residence" means a structure maintained and used as a single dwelling unit. Notwithstanding that a dwelling unit shares one or more walls with another dwelling unit, it is a single family residence if it has direct access to a street or thoroughfare and shares neither heating facilities, hot water equipment, nor any other essential facility or service with another dwelling unit.

(13) "Tenant" means a person entitled under a rental agreement to occupy a dwelling unit to the exclusion of others.

**History: En. 42-409 by Sec. 9, Ch. 313, L. 1977; R.C.M. 1947, 42-409.**

**70-24-104. Exclusions from application of chapter.** Unless created to avoid the application of this chapter, the following arrangements are not governed by this chapter:

(1) residence at a public or private institution if incidental to detention or the provision of medical, geriatric, educational, counseling, religious, or similar service;

(2) occupancy under a contract of sale of a dwelling unit or the property of which it is a part if the occupant is the purchaser or a person who succeeds to his interest;

(3) occupancy by a member of a fraternal or social organization in the portion of a structure operated for the benefit of the organization;

(4) transient occupancy in a hotel or motel;

(5) occupancy by an owner of a condominium unit or a holder of a proprietary lease in a cooperative;

(6) occupancy under a rental agreement covering premises used by the occupant primarily for commercial or agricultural purposes;

(7) occupancy by an employee of a landlord whose right to occupancy is conditional upon employment in and about the premises; and

(8) occupancy outside a municipality under a rental agreement which includes hunting, fishing, or agricultural privileges along with the use of the dwelling unit.

**History: En. 42-408 by Sec. 8, Ch. 313, L. 1977; R.C.M. 1947, 42-408.**

**70-24-105. Supplementary principles of law applicable.** Unless displaced by the provisions of this chapter, the principles of law and equity, including the law relating to capacity to contract, mutuality of obligations, principal and agent, real property, public health, safety and fire prevention, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, or other validating or invalidating causes, supplement its provisions.

**History: En. 42-403 by Sec. 3, Ch. 313, L. 1977; R.C.M. 1947, 42-403.**

**70-24-106. Construction against implicit repeal.** No part of this chapter is to be construed as impliedly repealed by subsequent legislation if that construction can reasonably be avoided.

**History: En. 42-404 by Sec. 4, Ch. 313, L. 1977; R.C.M. 1947, 42-404.**

**70-24-107. Territorial application.** This chapter applies to, regulates, and determines rights, obligations, and remedies under a rental agreement, wherever made, for a dwelling unit located within this state.

**History: En. 42-407 by Sec. 7, Ch. 313, L. 1977; R.C.M. 1947, 42-407.**

**70-24-108. What constitutes notice.** (1) A person has notice of a fact if:

(a) he has actual knowledge of it;

(b) in the case of a landlord, it is delivered at the place of business of the landlord through which the rental agreement was made; or

(c) in the case of a landlord or tenant, it is delivered in hand to the landlord or tenant or mailed by registered or certified mail to him at the place held out by him as the place for receipt of the communication or, in the absence of such designation, to his last known address.

(2) Notice received by an organization is effective for a particular transaction from the time it is brought to the attention of the individual conducting that transaction and, in any event, from the time it would have been brought to his attention if the organization had exercised reasonable diligence.

**History: En. 42-412 by Sec. 12, Ch. 313, L. 1977; R.C.M. 1947, 42-412.**

**70-24-109. Obligation of good faith.** Every duty under this chapter and every act which must be performed as a condition precedent to the exercise of a right or remedy under this chapter imposes an obligation of good faith in its performance or enforcement.

**History: En. 42-410 by Sec. 10, Ch. 313, L. 1977; R.C.M. 1947, 42-410.**

## Part 2

## Rental Agreements

**70-24-201. Rental agreement — terms and conditions.** (1) A landlord and a tenant may include in a rental agreement terms and conditions not prohibited by this chapter or other rule or law, including rent, term of the agreement, and other provisions governing the rights and obligations of the parties.

(2) Unless the rental agreement provides otherwise:

(a) the tenant shall pay as rent the fair rental value for the use and occupancy of the dwelling unit as determined by the landlord;

(b) rent is payable at the landlord's address;

(c) periodic rent is payable at the beginning of a term of a month or less and otherwise in equal monthly installments at the beginning of each month;

(d) rent is uniformly apportionable from day to day; and

(e) the tenancy is week to week in the case of a roomer who pays weekly rent and in all other cases month to month.

(3) Rent is payable without demand or notice at the time and place agreed upon by the parties or provided for by subsection (2) of this section.

**History: En. 42-413 by Sec. 13, Ch. 313, L. 1977; R.C.M. 1947, 42-413.**

**70-24-202. Prohibited provisions in rental agreements.** A rental agreement may not provide that a party:

(1) agrees to waive or forego rights or remedies under this chapter;

(2) authorizes any person to confess judgment on a claim arising out of the rental agreement; or

(3) agrees to the exculpation or limitation of liability resulting from the other party's purposeful misconduct or negligence or to indemnify the other party for that liability or the costs or attorney's fees connected therewith.

**History: En. 42-415 by Sec. 15, Ch. 313, L. 1977; R.C.M. 1947, 42-415(1).**

**70-24-203. Agreement not to permit receipt of rent free of obligation.** A rental agreement or a document related thereto may not permit the receipt of rent free of the obligation to comply with 70-24-303.

**History: En. 42-416 by Sec. 16, Ch. 313, L. 1977; R.C.M. 1947, 42-416.**

**70-24-204. Effect of unsigned or undelivered rental agreement.** (1) If the landlord does not sign and deliver a written rental agreement signed and delivered to him by the tenant, acceptance of rent without reservation by the landlord gives the rental agreement the same effect as if it had been signed and delivered by the landlord.

(2) If the tenant does not sign and deliver a written rental agreement signed and delivered to him by the landlord, acceptance of possession and payment of rent without reservation gives the rental agreement the same effect as if it had been signed and delivered by the tenant.

(3) If a rental agreement given effect by the operation of this section provides for a term longer than 1 year, it is effective for only 1 year.

**History: En. 42-414 by Sec. 14, Ch. 313, L. 1977; R.C.M. 1947, 42-414.**

## Part 3

## Rights and Duties of the Parties

**70-24-301. Duty to disclose name of person responsible.** (1) A landlord or a person authorized to enter into a rental agreement on his behalf shall disclose to the tenant in writing at or before the commencement of the tenancy the name and address of:

(a) the person authorized to manage the premises; and

(b) the owner of the premises or a person authorized to act for the owner for the purpose of service of process and receiving notices and demands.

(2) The information required to be furnished by this section shall be kept current and in writing, and this section extends to and is enforceable against any successor landlord, owner, or manager.

(3) A person who fails to comply with subsection (1) becomes an agent of each person who is a landlord for the purpose of:

(a) service of process and receiving notices and demands; and

(b) performing the obligations of the landlord under this chapter and under the rental agreement and expending or making available for that purpose all rent collected from the premises.

**History: En. 42-418 by Sec. 18, Ch. 313, L. 1977; R.C.M. 1947, 42-418.**

**70-24-302. Landlord to deliver possession of dwelling unit.** At the commencement of the term, a landlord shall deliver possession of the premises to the tenant in compliance with the rental agreement and 70-24-303. A landlord may bring an action for possession against a person wrongfully in possession.

**History: En. 42-419 by Sec. 19, Ch. 313, L. 1977; R.C.M. 1947, 42-419.**

**70-24-303. Landlord to maintain premises — agreement that tenant perform duties.** (1) A landlord shall:

(a) comply with the requirements of applicable building and housing codes materially affecting health and safety in effect at the time of original construction in all dwelling units where construction is completed after July 1, 1977;

(b) make repairs and do whatever is necessary to put and keep the premises in a fit and habitable condition;

(c) keep all common areas of the premises in a clean and safe condition;

(d) maintain in good and safe working order and condition all electrical, plumbing, sanitary, heating, ventilating, air-conditioning, and other facilities and appliances, including elevators, supplied or required to be supplied by him;

(e) provide and maintain appropriate receptacles and conveniences for the removal of ashes, garbage, rubbish, and other waste incidental to the occupancy of the dwelling unit and arrange for their removal; and

(f) supply running water and reasonable amounts of hot water at all times and reasonable heat between October 1 and May 1, except if the building that includes the dwelling unit is not required by law to be equipped for that purpose or the dwelling unit is so constructed that heat or hot water is generated by an installation within the exclusive control of the tenant.

(2) If the duty imposed by subsection (1)(a) of this section is greater than a duty imposed by subsections (1)(b) through (1)(f), a landlord's duty shall be determined by reference to subsection (1)(a).

(3) A landlord and tenant of a one-, two-, or three-family residence may agree in writing that the tenant perform the landlord's duties specified in subsections (1)(e) and (1)(f) of this section and specified repairs, maintenance tasks, alteration, and remodeling but only if the transaction is entered into in good faith and not for the purpose of evading the obligations of the landlord.

(4) A landlord and tenant of a one-, two-, or three-family residence may agree that the tenant is to perform specified repairs, maintenance tasks, alterations, or remodeling only if:

(a) the agreement of the parties is entered into in good faith and not for the purpose of evading the obligations of the landlord and is set forth in a separate writing signed by the parties and supported by adequate consideration;

(b) the work is not necessary to cure noncompliance with subsection (1)(a) of this section; and

(c) the agreement does not diminish the obligation of the landlord to other tenants in the premises.

**History: En. 42-420 by Sec. 20, Ch. 313, L. 1977; R.C.M. 1947, 42-420.**

**70-24-304. Transfer of premises or termination of management — relief from liability.** (1) Unless otherwise agreed, a landlord who conveys, in a good faith sale to a bona fide purchaser, premises that include a dwelling unit subject to a rental agreement is relieved of liability under the rental agreement and this chapter as to events occurring after written notice to the tenant of the conveyance. He remains liable to the tenant for all security recoverable by the tenant pursuant to chapter 25 of this title and all prepaid rent.

(2) Unless otherwise agreed, a manager of premises that include a dwelling unit is relieved of liability under the rental agreement and this chapter as to events occurring after written notice to the tenant of the termination of his management.

**History: En. 42-421 by Sec. 21, Ch. 313, L. 1977; R.C.M. 1947, 42-421.**

**70-24-305 through 70-24-310 reserved.**

**70-24-311. Landlord authorized to adopt rules.** (1) A landlord may adopt a rule concerning the tenant's use and occupancy of the premises. A rule is enforceable against the tenant only if:

(a) its purpose is to promote the convenience, safety, or welfare of the occupants in the premises, preserve the landlord's property from abusive use, or make a fair distribution of services and facilities held out for the tenants generally;

(b) it is reasonably related to the purpose for which it is adopted;

(c) it applies to all occupants in the premises in a fair manner;

(d) it is sufficiently explicit in its prohibition, direction, or limitation of the tenant's conduct to fairly inform him of what he must or must not do to comply;

(e) it is not for the purpose of evading the obligations of the landlord; and

(f) the tenant has notice of it at the time he enters into the rental agreement or when it is adopted.

(2) If a rule is adopted after a tenant enters into a rental agreement that works a substantial modification of his bargain, it is not valid until 7 days after notice to the tenant in the case of a week to week tenancy or 30 days' notice in the case of tenancies from month to month.

**History: En. 42-423 by Sec. 23, Ch. 313, L. 1977; R.C.M. 1947, 42-423.**

**70-24-312. Access to premises by landlord.** (1) A tenant may not unreasonably withhold consent to the landlord or his agent to enter into the dwelling unit in order to inspect the premises, make necessary or agreed repairs, decorations, alterations, or improvements, supply necessary or agreed services, or exhibit the dwelling unit to prospective or actual purchasers, mortgagees, tenants, workmen, or contractors.

(2) A landlord may enter the dwelling unit without consent of the tenant in case of emergency.

(3) A landlord may not abuse the right of access or use it to harass the tenant. Except in case of emergency or unless it is impracticable to do so, the landlord shall give the tenant at least 24 hours' notice of his intent to enter and may enter only at reasonable times.

(4) A landlord has no other right of access except:

(a) pursuant to court order;

(b) as permitted by 70-24-425 and 70-24-426(2); or

(c) when the tenant has abandoned or surrendered the premises.

**History: En. 42-424 by Sec. 24, Ch. 313, L. 1977; R.C.M. 1947, 42-424.**

**70-24-313 through 70-24-320 reserved.**

**70-24-321. Tenant to maintain dwelling unit.** (1) A tenant shall:

(a) comply with all obligations primarily imposed upon tenants by applicable provisions of building and housing codes materially affecting health and safety;

(b) keep that part of the premises that he occupies and uses as reasonably clean and safe as the condition of the premises permits;

(c) dispose from his dwelling unit all ashes, garbage, rubbish, and other waste in a clean and safe manner;

(d) keep all plumbing fixtures in the dwelling unit or used by the tenant as clean as their condition permits;

(e) use in a reasonable manner all electrical, plumbing, sanitary, heating, ventilating, air-conditioning, and other facilities and appliances, including elevators, in the premises;

(f) conduct himself and require other persons on the premises with his consent to conduct themselves in a manner that will not disturb his neighbors' peaceful enjoyment of the premises; and

(g) use the parts of the premises including the living room, bedroom, kitchen, bathroom, and dining room in a reasonable manner considering the purposes for which they were designed and intended.

(2) A tenant may not destroy, deface, damage, impair, or remove any part of the premises or permit any person to do so.

**History: En. 42-422 by Sec. 22, Ch. 313, L. 1977; R.C.M. 1947, 42-422.**

**70-24-322. Tenant to occupy as dwelling unit only — extended absence.** (1) Unless otherwise agreed, a tenant shall occupy his dwelling unit only as a dwelling unit.

(2) The rental agreement may require that the tenant notify the landlord of an anticipated extended absence from the premises in excess of 7 days no later than the first day of the extended absence.

**History: En. 42-425 by Sec. 25, Ch. 313, L. 1977; R.C.M. 1947, 42-425.**

## Part 4

## Remedies

**70-24-401. Administration of remedies — enforcement.** (1) The remedies provided by this chapter shall be so administered that an aggrieved party may recover appropriate damages. The aggrieved party has a duty to mitigate damages.

(2) A right or obligation declared by this chapter is enforceable by action unless the provision declaring it specifies a different and limited effect.

**History: En. 42-405 by Sec. 5, Ch. 313, L. 1977; R.C.M. 1947, 42-405.**

**70-24-402. Settlement of disputed claim or right.** A claim or right arising under this chapter or on a rental agreement, if disputed in good faith, may be settled by agreement.

**History: En. 42-406 by Sec. 6, Ch. 313, L. 1977; R.C.M. 1947, 42-406.**

**70-24-403. Prohibited provision in rental agreement — unenforceability — damages.** (1) A provision prohibited by 70-24-202 included in a rental agreement is unenforceable.

(2) If a party purposefully uses a rental agreement containing provisions known by him to be prohibited, the other party may recover, in addition to his actual damages, an amount up to 3 months' periodic rent.

**History: En. 42-415 by Sec. 15, Ch. 313, L. 1977; R.C.M. 1947, 42-415(2).**

**70-24-404. Unconscionability — court discretion to refuse enforcement.** (1) If the court, as a matter of law, finds that:

(a) a rental agreement or any provision thereof is unconscionable, the court may refuse to enforce the agreement or enforce the remainder of the agreement without the unconscionable provision to avoid an unconscionable result; or

(b) a settlement in which a party waives or agrees to forego a claim or right under this chapter or under a rental agreement is unconscionable, the court may refuse to enforce the settlement, enforce the remainder of the settlement without the unconscionable provision, or limit the application of any unconscionable provision to avoid an unconscionable result.

(2) If unconscionability is put into issue by a party or by the court upon its own motion, the parties shall be afforded a reasonable opportunity to present evidence as to the setting, purpose, and effect of the rental agreement or settlement to aid the court in making the determination.

**History: En. 42-411 by Sec. 11, Ch. 313, L. 1977; R.C.M. 1947, 42-411.**

**70-24-405. Failure of landlord to deliver possession — tenant's remedies.** (1) If the landlord fails to deliver possession of the dwelling unit to the tenant as provided in 70-24-302, rent abates until possession is delivered and the tenant may:

(a) terminate the rental agreement upon at least 5 days' written notice to the landlord and, upon termination, the landlord shall return all prepaid rent and security; or

(b) demand performance of the rental agreement by the landlord and, if the tenant elects, maintain an action for possession of the dwelling unit against the landlord or a person wrongfully in possession and recover the actual damages sustained by him.

(2) If a person's failure to deliver possession is purposeful and not in good faith, an aggrieved party may recover from that person an amount not more than 3 months' periodic rent or treble damages, whichever is greater.

**History: En. 42-427 by Sec. 27, Ch. 313, L. 1977; R.C.M. 1947, 42-427.**

**70-24-406. Failure of landlord to maintain premises — tenant's remedies.** (1) Except as provided in this chapter, if there is a noncompliance with 70-24-303 affecting health and safety, the tenant may:

(a) deliver a written notice to the landlord specifying the acts and omissions constituting the breach and that the rental agreement will terminate upon a date not less than 30 days after receipt of the notice if the breach is not remedied in 14 days. The rental agreement terminates as provided in the notice subject to the following exceptions:

(i) if the breach is remediable by repairs, the payment of damages, or otherwise and the landlord adequately remedies the breach before the date specified in the notice, the rental agreement does not terminate by reason of the breach;

(ii) if substantially the same act or omission which constituted a prior noncompliance of which notice was given recurs within 6 months, the tenant may terminate the rental agreement upon at least 14 days' written notice specifying the breach and the date of termination of the rental agreement;

(iii) the tenant may not terminate for a condition caused by himself, a member of his family, or other persons on the premises with his consent;

(b) make repairs himself that do not cost more than 1 month's rent and deduct the cost from the rent if he has given the landlord notice and he has not made the repairs within a reasonable time.

(2) Except as provided in this chapter, the tenant may recover actual damages and obtain injunctive relief for any noncompliance by the landlord with the rental agreement or 70-24-303.

(3) The remedy provided in subsection (2) of this section is in addition to a right of the tenant arising under subsection (1).

(4) If the rental agreement is terminated, the landlord shall return all security recoverable by the tenant pursuant to chapter 25 of this title.

**History: En. 42-426 by Sec. 26, Ch. 313, L. 1977; R.C.M. 1947, 42-426.**

**70-24-407. Damages for minor violations by landlord.** If the landlord fails to comply with the rental agreement or 70-24-303 and the reasonable cost of compliance is less than the 1 month's rent, the tenant may recover damages for the breach under 70-24-406(2).

**History: En. 42-428 by Sec. 28, Ch. 313, L. 1977; R.C.M. 1947, 42-428.**

**70-24-408. Purposeful or negligent failure to provide essential services — tenant's remedies.** (1) If contrary to the rental agreement or 70-24-303 the landlord purposefully or negligently fails to supply heat, running water, hot water, electric, gas, or other essential services, the tenant may give written notice to the landlord specifying the breach and may:

(a) procure reasonable amounts of heat, hot water, running water, electricity, gas, and other essential services during the period of the landlord's noncompliance and deduct their actual and reasonable cost from the rent;

(b) recover damages based upon the diminution in the fair rental value of the dwelling unit; or

(c) procure reasonable substitute housing during the period of the landlord's noncompliance, in which case the tenant is excused from paying rent for the period of the landlord's noncompliance.

(2) If the tenant proceeds under this section, he may not proceed under 70-24-406 or 70-24-407 as to that breach.

(3) Rights of the tenant under this section do not arise until he has given notice to the landlord and the landlord has had a reasonable opportunity to correct the conditions or if the conditions were caused by the act or omission of the tenant, a member of his family, or other person on the premises with his consent.

**History: En. 42-429 by Sec. 29, Ch. 313, L. 1977; R.C.M. 1947, 42-429.**

**70-24-409. Fire or casualty damage — rights of tenant.** (1) If the dwelling unit or premises are damaged or destroyed by fire or casualty to an extent that enjoyment of the dwelling unit is substantially impaired, the tenant may:

(a) immediately vacate the premises and notify the landlord in writing within 14 days thereafter of his intention to terminate the rental agreement, in which case the rental agreement terminates as of the date of vacating; or

(b) if continued occupancy is lawful, vacate any part of the dwelling unit rendered unusable by the fire or casualty, in which case the tenant's liability for rent is reduced in proportion to the diminution in the fair rental value of the dwelling unit.

(2) This section does not apply when the fire and casualty damage was caused by the purposeful or negligent act of the tenant, the tenant's family, or guests.

(3) If the rental agreement is terminated, the landlord shall return all security recoverable pursuant to chapter 25 of this title and all prepaid rent. Accounting for rent in the event of termination or apportionment shall be made as of the date of the fire or casualty.

**History: En. 42-431 by Sec. 31, Ch. 313, L. 1977; R.C.M. 1947, 42-431.**

**70-24-410. Unlawful or unreasonable entry by landlord — tenant's remedies.** If the landlord makes an unlawful entry or a lawful entry in an unreasonable manner or makes repeated demands for entry otherwise lawful but which have the effect of unreasonably harassing the tenant, the tenant may either obtain injunctive relief to prevent the recurrence of the conduct or terminate the rental agreement. In either case the tenant may recover actual damages.

**History: En. 42-441 by Sec. 41, Ch. 313, L. 1977; R.C.M. 1947, 42-441(2).**

**70-24-411. Unlawful ouster, exclusion, or diminution of service — tenant's remedies.** If a landlord unlawfully removes or excludes the tenant from the premises or purposefully diminishes services to the tenant by interrupting or causing the interruption of heat, running water, hot water, electricity, gas, or other essential services, the tenant may recover possession or terminate the rental agreement and, in either case, recover an amount not more than 3 months' periodic rent or treble damages, whichever is greater. If the rental agreement is terminated, the landlord shall return all security recoverable pursuant to chapter 25 of this title and all prepaid rent.

**History: En. 42-432 by Sec. 32, Ch. 313, L. 1977; R.C.M. 1947, 42-432.**

**70-24-412 through 70-24-420 reserved.**

**70-24-421. Action for nonpayment of rent — tenant's counterclaim.** (1) In an action for possession based upon nonpayment of the rent or in an action for rent when the tenant is in possession, the tenant may counterclaim for any amount he may recover under the rental agreement or this chapter. The court from time to time may order the tenant to pay into court all or part of the rent accrued and thereafter accruing and shall determine the amount due to each party. The party to whom a net amount is owed shall be paid first from the money paid into court and the balance by the other party. The court may at any time release money paid into the court to either party if the parties so agree or if the court finds a party entitled to the sums released. If no rent remains due after application of this section, judgment shall be entered for the tenant in the action for possession.

(2) In an action for rent when the tenant is not in possession, he may counterclaim as provided in subsection (1) of this section but is not required to pay any rent into court.

**History: En. 42-430 by Sec. 30, Ch. 313, L. 1977; R.C.M. 1947, 42-430.**

**70-24-422. Noncompliance of tenant generally — landlord's right of termination — damages — injunction.** (1) Except as provided in this chapter, if there is a noncompliance by the tenant with the rental agreement or a noncompliance with 70-24-321 affecting health and safety, the landlord may deliver a written notice to the tenant pursuant to 70-24-108 specifying the acts and omissions constituting the breach and that the rental agreement will terminate upon a date not less than 14 days after receipt of the notice. If the breach is not remedied within that time, the rental agreement terminates as provided in the notice subject to the following exceptions:

(a) If the breach is remediable by repairs, the payment of damages, or otherwise and the tenant adequately remedies the breach before the date specified in the notice, the rental agreement does not terminate.

(b) If substantially the same act or omission which constituted a prior noncompliance of which notice was given recurs within 6 months, the landlord may terminate the rental agreement upon at least 5 days' written notice specifying the breach and the date of the termination of the rental agreement.

(2) If rent is unpaid when due and the tenant fails to pay rent within 3 days after written notice by the landlord of nonpayment and his intention to terminate the rental agreement if the rent is not paid within that period, the landlord may terminate the rental agreement.

(3) Except as provided in this chapter, the landlord may recover actual damages and obtain injunctive relief for any noncompliance by the tenant with the rental agreement or 70-24-321. If the tenant's noncompliance is purposeful, the landlord may recover treble damages.

**History: En. 42-433 by Sec. 33, Ch. 313, L. 1977; R.C.M. 1947, 42-433.**

**70-24-423. Waiver of landlord's right to terminate for breach.** Acceptance by the landlord of full payment of rent due with knowledge of a tenant's default or acceptance by the landlord of a tenant's performance that varies from the terms of the rental agreement constitutes a waiver of the landlord's right to terminate the rental agreement for that breach unless otherwise agreed after the breach has occurred. The acceptance of partial payment of rent due does not constitute a waiver of any right.

**History: En. 42-436 by Sec. 36, Ch. 313, L. 1977; R.C.M. 1947, 42-436.**

**70-24-424. Refusal of access — landlord's remedies.** If the tenant refuses to allow lawful access, the landlord may either obtain injunctive relief to compel access or terminate the rental agreement. In either case the landlord may recover actual damages.

**History: En. 42-441 by Sec. 41, Ch. 313, L. 1977; R.C.M. 1947, 42-441(1).**

**70-24-425. Failure of tenant to maintain dwelling — landlord's right to enter and repair.** If there is noncompliance by the tenant with 70-24-321 affecting health and safety that can be remedied by repair, replacement of a damaged item, or cleaning and the tenant fails to comply as promptly as conditions require in case of emergency or within 14 days after written notice by the landlord specifying the breach and requesting that the tenant remedy it within that period of time, the landlord may enter the dwelling unit and cause the work to be done in a workmanlike manner and submit an itemized bill for the actual and reasonable cost, the fair and reasonable cost, or the fair and reasonable value thereof as rent on the next date periodic rent is due or, if the rental agreement has terminated, for immediate payment.

**History: En. 42-434 by Sec. 34, Ch. 313, L. 1977; R.C.M. 1947, 42-434.**

**70-24-426. Remedies for absence or abandonment.** (1) If the rental agreement requires the tenant to give notice to the landlord of an anticipated extended absence in excess of 7 days, as provided for in 70-24-322, and the tenant fails to do so, the landlord may recover actual damages from the tenant.

(2) During an absence of the tenant in excess of 7 days, the landlord may enter the dwelling unit at times reasonably necessary.

(3) If the tenant abandons the dwelling unit, the landlord shall make reasonable efforts to rent it at a fair rental. If the landlord rents the dwelling unit for a term beginning before the expiration of the rental agreement, the rental agreement terminates as of the date of the tenancy. If the landlord fails to use reasonable efforts to rent the dwelling unit at a fair rental or if the landlord accepts the abandonment as a surrender, the rental agreement is terminated by the landlord as of the date the landlord has notice of the abandonment. If the tenancy is from month to month or week to week, the term of the rental agreement for this purpose is a month or a week, as the case may be.

**History: En. 42-435 by Sec. 35, Ch. 313, L. 1977; R.C.M. 1947, 42-435.**

**70-24-427. Landlord's remedies after termination.** If the rental agreement is terminated, the landlord has a claim for possession and for rent and a separate claim for actual damages for any breach of the rental agreement.

**History: En. 42-438 by Sec. 38, Ch. 313, L. 1977; R.C.M. 1947, 42-438.**

**70-24-428. Landlord's recovery of possession limited.** Except in the case of abandonment, surrender, or as permitted in this chapter, a landlord may not recover or take possession of the dwelling unit by action or otherwise, including purposeful diminution of services to the tenant by interrupting or causing the interruption of heat, running water, hot water, electricity, gas, or other essential services.

**History: En. 42-439 by Sec. 39, Ch. 313, L. 1977; R.C.M. 1947, 42-439.**

**70-24-429. Holdover remedies — consent to continued occupancy.** (1) If the tenant remains in possession without the landlord's consent after expiration of the term of the rental agreement or its termination, the landlord may bring an action for possession. If the tenant's holdover is purposeful and not in good faith, the landlord may recover an amount not more than 3 months' periodic rent or treble damages, whichever is greater.

(2) If the landlord consents to the tenant's continued occupancy, 70-24-201(2)(e) applies.

**History: En. 42-440 by Sec. 40, Ch. 313, L. 1977; R.C.M. 1947, 42-440(3).**

**70-24-430. Disposition of personal property abandoned by tenant after termination.** (1) If a tenancy terminates in any manner except by court order and the landlord reasonably believes the tenant has abandoned all personal property which the tenant has left on the premises, the landlord shall:

(a) make reasonable attempts to notify the tenant in writing that the property must be removed:

(i) from the premises; or

(ii) from the place of safekeeping if the landlord has stored the goods as provided in subsection (3) of this section; and

(b) specify a day not less than 15 days after delivery of a notice mailed by certified mail to the last-known address of the tenant, at which specified time the property will be disposed of if not removed.

(2) The landlord may dispose of the property by:

(a) selling all or part of the property at a public or private sale; or

(b) destroying or otherwise disposing of all or part of the property if he reasonably believes the value of the property is so low that the cost of storage or sale exceeds the reasonable value thereof.

(3) After notifying the tenant as required by subsection (1) of this section, the landlord shall store all goods, chattels, and personal property of the tenant in a place of safekeeping and shall exercise reasonable care for the property. The landlord may store the property in a commercial storage company, in which case the storage cost includes the actual storage charge plus the cost of removal of the property to the place of storage.

(4) If the tenant, upon receipt of the notice provided in subsection (1) of this section, responds in writing to the landlord on or before the day specified in the notice that he intends to remove his property and does not do so within 15 days after delivery of the tenant's response, the tenant's property shall be conclusively presumed to be abandoned. If the tenant removes the property, the landlord is entitled to reasonable or actual storage costs for the period the property remains in safekeeping plus the cost of removal of the property to the place of storage.

(5) The landlord is not responsible for any loss to the tenant resulting from storage unless the loss is caused by the landlord's purposeful or negligent act. On the event of purposeful violation, the landlord is liable for double damages.

(6) A public or private sale authorized by this section shall be conducted under the provisions of 30-9-504(3).

(7) The landlord may deduct from the proceeds of the sale the reasonable costs of notice, storage, and sale and must remit to the tenant the remaining proceeds, if any, together with an itemized accounting. If the tenant cannot after due diligence be found, the remaining proceeds shall be deposited with the county treasurer of the county in which the sale occurred and, if not claimed within 3 years, shall revert to the general fund of the county available for general purposes.

**History: En. 42-437 by Sec. 37, Ch. 313, L. 1977; R.C.M. 1947, 42-437.**

**70-24-431. Retaliatory conduct by landlord prohibited.** (1) Except as provided in this section, a landlord may not retaliate by increasing rent, decreasing services, or by bringing or threatening to bring an action for possession after the tenant:

(a) has complained of a violation applicable to the premises materially affecting health and safety to a governmental agency charged with responsibility for enforcement of a building or housing code;

(b) has complained to the landlord in writing of a violation under 70-24-303; or

(c) has organized or become a member of a tenant's union or similar organization.

(2) If the landlord acts in violation of subsection (1) of this section, the tenant is entitled to the remedies provided in 70-24-411 and has a defense in any retaliatory action against him for possession.

(3) In an action by or against the tenant, evidence of a complaint within 6 months before the alleged act of retaliation creates a rebuttable presumption that the landlord's conduct was in retaliation. The presumption does not arise if the tenant made the complaint after notice of a proposed rent increase or diminution of services. For purposes of this section, "rebuttable presumption" means that the trier of fact must find the existence of the fact presumed unless and until evidence is introduced which would support a finding of its nonexistence.

(4) Notwithstanding subsections (1), (2), and (3) of this section, a landlord may bring an action for possession if:

(a) the violation of the applicable building or housing code was caused primarily by lack of reasonable care by the tenant, a member of his family, or other persons on the premises with his consent;

(b) the tenant is in default in rent; or

(c) compliance with the applicable building or housing code requires alteration, remodeling, or demolition which would effectively deprive the tenant of use of the dwelling unit.

(5) The maintenance of an action under subsection (4) of this section does not release the landlord from liability under 70-24-405(2).

**History: En. 42-442 by Sec. 42, Ch. 313, L. 1977; R.C.M. 1947, 42-442.**

**70-24-432 through 70-24-440 reserved.**

**70-24-441. Termination by landlord or tenant.** (1) The landlord or the tenant may terminate a week-to-week tenancy by a written notice given to the other at least 7 days before the termination date specified in the notice.

(2) The landlord or the tenant may terminate a month-to-month tenancy by giving to the other at any time during the tenancy at least 30 days' notice in writing prior to the date designated in the notice for the termination of the tenancy.

(3) The tenancy terminates on the date designated and without regard to the expiration of the period for which, by the terms of the tenancy, rents are to be paid. Unless otherwise agreed, rent is uniformly apportionable from day to day.

**History: En. 42-440 by Sec. 40, Ch. 313, L. 1977; R.C.M. 1947, 42-440(1), (2).**

**70-24-442. Attorney fees — costs.** (1) In an action on a rental agreement or arising under this chapter, reasonable attorney fees, together with costs and necessary disbursements, may be awarded to the prevailing party notwithstanding an agreement to the contrary.

(2) As used in this section, "prevailing party" means the party in whose favor final judgment is rendered.

**History: En. 42-417 by Sec. 17, Ch. 313, L. 1977; R.C.M. 1947, 42-417.**

# CHAPTER 25

# RESIDENTIAL TENANTS' SECURITY DEPOSITS

### Part 1 — General Provisions

Section

70-25-101. Definitions.
70-25-102. Application of chapter.
70-25-103. Waivers and contrary provisions invalid.

### Part 2 — Rights and Duties

70-25-201. Security deposit — deductions authorized therefrom.
70-25-202. List of damages and refund — delivery to departing tenant.
70-25-203. Failure to provide list — forfeiture of deduction rights.
70-25-204. Wrongful withholding of security deposit — action.
70-25-205. Failure of departing tenant to furnish new address.
70-25-206. Landlord to furnish statement of condition of premises at beginning of lease.

## Part 1

## General Provisions

**70-25-101. Definitions.** As used in this chapter, the following definitions apply:

(1) "Cleaning expenses" means the actual and necessary cost of cleaning done by an owner or his selected representative for cleaning needs not attributable to normal wear brought about by the tenant's failure to bring the premises to the condition it was at the time of renting.

(2) "Damage" means any and all tangible loss, injury, or deterioration of a leasehold premises caused by the willful or accidental acts of the tenant occupying same or by the tenant's family, licensees, or invitees, as well as any and all tangible loss, injury, or deterioration resulting from the tenant's omissions or failure to perform any duty imposed upon the tenant by law with respect to the leasehold.

(3) "Leasehold premises" means the premises occupied by the tenant together with all common areas, recreational facilities, parking areas, and storage facilities to which the tenant has access, as well as all personal property owned or controlled by the landlord the use of which is permitted to the tenant.

(4) "Security deposit" means value given, in money or its equivalent, to secure the payment of rent by the tenant under a leasehold agreement or to secure payment for damage to and cleaning of the leasehold premises. If a leasehold agreement or an agreement incident thereto requires the tenant or prospective tenant to provide or maintain in effect any deposit to the landlord for part or all of the term of the leasehold agreement, the deposit shall be presumed to be a security deposit.

**History: En. 42-301 by Sec. 1, Ch. 219, L. 1974; amd. Sec. 1, Ch. 297, L. 1977; R.C.M. 1947, 42-301.**

**70-25-102. Application of chapter.** This chapter applies to all rentals of dwellings, including mobile homes but excluding property of public housing authorities.

**History: En. 42-302 by Sec. 2, Ch. 219, L. 1974; R.C.M. 1947, 42-302.**

**70-25-103. Waivers and contrary provisions invalid.** Any provision of a leasehold agreement, either oral or written, that is contrary to this section shall be invalid. Any attempted waiver of this section by the tenant shall be invalid.

**History: En. 42-309 by Sec. 9, Ch. 219, L. 1974; R.C.M. 1947, 42-309.**

## Part 2

## Rights and Duties

**70-25-201. Security deposit — deductions authorized therefrom.** (1) Any landlord renting property covered by this section may deduct from the security deposit a sum equal to the damage alleged to have been caused by the tenant, together with a sum equal to the unpaid rent owing to the landlord at the time of such deduction and a sum for actual cleaning expenses.

(2) No cleaning charges may be imposed for normal maintenance performed on a cyclical basis by the landlord as noted by the landlord at the time the tenant occupies the space unless the landlord is forced to perform this maintenance because of negligence of the tenant. Additionally, no cleaning charges can be deducted until notice has been given to the tenant. The notice shall include the cleaning not accomplished by the tenant and the additional and type or types of

cleaning which need to be done by the tenant to bring the premises back to its condition at the time of its renting. After the delivery of the notice, the tenant shall have 48 hours to complete the required cleaning.

(3) No person may deduct or withhold from the security deposit any amount for purposes other than those set forth in this subsection.

**History: En. 42-303 by Sec. 3, Ch. 219, L. 1974; amd. Sec. 2, Ch. 297, L. 1977; R.C.M. 1947, 42-303.**

**70-25-202. List of damages and refund — delivery to departing tenant.** Every landlord, within 30 days subsequent to the termination of a tenancy or within 30 days subsequent to a surrender and acceptance of the leasehold premises, whichever occurs first, shall provide the departing tenant with a written list of any damage and cleaning charges, brought after the provisions of 70-25-201 have been followed, to the leasehold premises which the landlord alleges is the responsibility of the tenant. Delivery of such list shall be accompanied by payment of the difference, if any, between the security deposit and the permitted charges set forth in 70-25-201. Delivery shall be accomplished by mailing the list and refund to the tenant's last-known address or the new address provided by the tenant.

**History: En. 42-304 by Sec. 4, Ch. 219, L. 1974; amd. Sec. 3, Ch. 297, L. 1977; R.C.M. 1947, 42-304.**

**70-25-203. Failure to provide list — forfeiture of deduction rights.** Any landlord who fails to provide the departing tenant with a written list of damage and cleaning charges as required by 70-25-202 shall forfeit all rights to withhold any portion of the security deposit for the damages or cleaning charges.

**History: En. 42-305 by Sec. 5, Ch. 219, L. 1974; amd. Sec. 4, Ch. 297, L. 1977; R.C.M. 1947, 42-305.**

**70-25-204. Wrongful withholding of security deposit — action.** (1) Any person who wrongfully withholds a residential property security deposit or any portion thereof shall be liable in damages to the tenant in a civil action for an amount equal to double the sum determined to have been wrongfully withheld or deducted. The attorney's fees may be awarded the prevailing party at the discretion of the court. The burden of proof of damages caused by the tenant to the leasehold premises shall be on the landlord.

(2) No action may be maintained by a tenant for any amount wrongfully withheld or deducted prior to:

(a) the tenant's receipt from the landlord or his agent of a written denial of the sum alleged to be wrongfully detained;

(b) the expiration of a 30-day period after the termination of a tenancy; or

(c) the expiration of a 30-day period after surrender and acceptance of the leasehold premises, whichever occurs first.

**History: En. 42-306 by Sec. 6, Ch. 219, L. 1974; R.C.M. 1947, 42-306.**

**70-25-205. Failure of departing tenant to furnish new address.** Failure by the departing tenant to provide the landlord with his new address in writing upon termination of the tenancy or upon surrender and acceptance of the leasehold premises, whichever occurs first, shall relieve the landlord from double liability as imposed by 70-25-204. Such failure shall not, however, bar the tenant from recovering the actual amount owing to him by the landlord.

**History: En. 42-307 by Sec. 7, Ch. 219, L. 1974; R.C.M. 1947, 42-307.**

**70-25-206. Landlord to furnish statement of condition of premises at beginning of lease.** (1) Any person engaged in the rental of property for residential purposes who requires a security deposit shall furnish to each prospective tenant, prior to execution of a lease or creation of a tenancy, a separate written statement as to the present condition of the premises intended to be let, as well as a copy of the written list of damage and cleaning charges, if any, provided to the tenant of the immediately preceding leasehold agreement for the premises in question.

(2) Each written statement of the present condition of a premises intended to be let shall contain at least the following:

(a) a clear and concise statement of the present condition of the premises known to the landlord or his agent or which should have been known upon reasonable inspection;

(b) if the premises have never previously been let, a statement indicating such fact;

(c) if any damage to the leasehold premises resulting from the immediately preceding leasehold agreement has not been restored, a statement indicating such fact and setting forth such unrestored damage; and

(d) the signature of the landlord or his agent.

(3) Any person engaged in the rental of property for residential purposes who fails to furnish a prospective tenant, prior to the execution of the lease or creation of the tenancy, with a separate written statement of the present condition of the premises intended to be let and, if any, a written list of damage and cleaning charges provided to the tenant of the immediately preceding leasehold agreement shall be barred from recovering any sum for damage to or cleaning of the leasehold premises unless he can establish by clear and convincing evidence that the damage occurred during the tenancy in question and was caused by the tenant occupying the leasehold premises or the tenant's family, licensees, or invitees.

**History: En. 42-308 by Sec. 8, Ch. 219, L. 1974; amd. Sec. 5, Ch. 297, L. 1977; R.C.M. 1947, 42-308.**

# CHAPTER 26

## LANDLORD AND TENANT SUPPLEMENTARY PROVISIONS RESIDENTIAL AND COMMERCIAL

### Part 1 — Residential and Commercial

Section

70-26-101. Letting of parts of rooms prohibited.
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70-26-206. Rights of tenant for years or at will.
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## Part 1

## Residential and Commercial

**70-26-101. Letting of parts of rooms prohibited.** One who hires part of a room for a dwelling is entitled to the whole of the room, notwithstanding any agreement to the contrary, and if a landlord lets a room as a dwelling for more than one family, the person to whom he first lets any part of it is entitled to the possession of the whole room for the term agreed upon, and every tenant in the building under the same landlord is relieved from all obligation to pay rent to him while such double letting of any room continues.

**History: En. Sec. 2629, Civ. C. 1895; re-en. Sec. 5235, Rev. C. 1907; re-en. Sec. 7750, R.C.M. 1921; Cal. Civ. C. Sec. 1950; Based on Field Civ. C. Sec. 998; re-en. Sec. 7750, R.C.M. 1935; R.C.M. 1947, 42-210.**

**70-26-102. Transferee of rental property to have same rights as transferor.** A person to whom any real property is transferred or devised, upon which rent has been reserved, or to whom any such rent is transferred is entitled to the same remedies for recovery of rent, for nonperformance of any of the terms of the lease, or of any waste or cause of forfeiture as his grantor or devisor might have had.

**History: En. Sec. 1273, Civ. C. 1895; re-en. Sec. 4521, Rev. C. 1907; re-en. Sec. 6763, R.C.M. 1921; Cal. Civ. C. Sec. 821; Field Civ. C. Sec. 260; re-en. Sec. 6763, R.C.M. 1935; R.C.M. 1947, 67-704.**

**70-26-103. Attornment of tenant to stranger void.** The attornment of a tenant to a stranger is void unless it is made with the consent of the landlord or in consequence of a judgment of a court of competent jurisdiction.

**History: En. Sec. 48, p. 487, Bannack Stat.; re-en. Sec. 48, p. 403, Cod. Stat. 1871; re-en. Sec. 225, 5th Div. Rev. Stat. 1879; re-en. Sec. 283, 5th Div. Comp. Stat. 1887; re-en. Sec. 2627, Civ. C. 1895; re-en. Sec. 5233, Rev. C. 1907; re-en. Sec. 7748, R.C.M. 1921; Cal. Civ. C. Sec. 1948; re-en. Sec. 7748, R.C.M. 1935; R.C.M. 1947, 42-208.**

**70-26-104. Notice of action by third person served on tenant — duty to inform landlord.** Every tenant who receives notice of any proceeding to recover the real property occupied by him or the possession thereof must immediately inform his landlord of the same and also deliver to the landlord the notice, if in writing, and is responsible to the landlord for all damages which he may sustain by reason of any omission to inform him of the notice or to deliver it to him if in writing.

**History: En. Sec. 2628, Civ. C. 1895; re-en. Sec. 5234, Rev. C. 1907; re-en. Sec. 7749, R.C.M. 1921; Cal. Civ. C. Sec. 1949; Based on Field Civ. C. Sec. 997; re-en. Sec. 7749, R.C.M. 1935; R.C.M. 1947, 42-209.**

**70-26-105. Assignee of lessee — remedies of lessor against.** Whatever remedies the lessor of any real property has against his immediate lessee for the breach of any agreement in the lease or for recovery of the possession, he has against the assignees of the lessee for any cause of action accruing while they are such assignees, except where the assignment is made by way of security for a loan and is not accompanied by possession of the premises.

**History: En. Sec. 1274, Civ. C. 1895; re-en. Sec. 4522, Rev. C. 1907; re-en. Sec. 6764, R.C.M. 1921; Cal. Civ. C. Sec. 822; Based on Field Civ. C. Sec. 261; re-en. Sec. 6764, R.C.M. 1935; R.C.M. 1947, 67-705.**

**70-26-106. Rights of lessee and his assignees against lessor and his assignees.** Whatever remedies the lessee of any real property may have against his immediate lessor for the breach of any agreement in the lease, he may have against the assigns of the lessor and the assigns of the lessee may have against the lessor and his assigns, except upon covenants against encumbrances or relating to the title or possession of the premises.

**History: En. Sec. 1275, Civ. C. 1895; re-en. Sec. 4523, Rev. C. 1907; re-en. Sec. 6765, R.C.M. 1921; Cal. Civ. C. Sec. 823; re-en. Sec. 6765, R.C.M. 1935; R.C.M. 1947, 67-706.**

**70-26-107. Remedy for rent on lease for life.** Rent due upon a lease for life may be recovered in the same manner as upon a lease for years.

**History: En. Sec. 1276, Civ. C. 1895; re-en. Sec. 4524, Rev. C. 1907; re-en. Sec. 6766, R.C.M. 1921; Cal. Civ. C. Sec. 824; Field Civ. C. Sec. 263; re-en. Sec. 6766, R.C.M. 1935; R.C.M. 1947, 67-707.**

**70-26-108. Rent dependent on life — recovery.** Rent dependent on the life of a person may be recovered after as well as before his death.

**History: En. Sec. 1277, Civ. C. 1895; re-en. Sec. 4525, Rev. C. 1907; re-en. Sec. 6767, R.C.M. 1921; Cal. Civ. C. Sec. 825; Field Civ. C. Sec. 264; re-en. Sec. 6767, R.C.M. 1935; R.C.M. 1947, 67-708.**

**70-26-109. Change of lease terms by notice.** In all leases of lands or tenements or of any interest therein from month to month, the landlord may, upon giving notice in writing at least 15 days before the expiration of the month, change the terms of the lease to take effect at the expiration of the month. The notice, when served upon the tenant, shall of itself operate and be effectual to create and establish as a part of the lease the terms, rent, and conditions specified in the notice if the tenant shall continue to hold the premises after the expiration of the month.

**History: En. Sec. 1279, Civ. C. 1895; re-en. Sec. 4527, Rev. C. 1907; re-en. Sec. 6769, R.C.M. 1921; Cal. Civ. C. Sec. 827; re-en. Sec. 6769, R.C.M. 1935; R.C.M. 1947, 67-710.**

**70-26-110. Lease of city lot for over 75 years void.** No lease or grant of any town or city lot for a period longer than 75 years, in which shall be reserved any rent or service of any kind, shall be valid.

**History: En. Sec. 1153, Civ. C. 1895; re-en. Sec. 4466, Rev. C. 1907; re-en. Sec. 6708, R.C.M. 1921; Cal. Civ. C. Sec. 718; amd. Sec. 1, Ch. 147, L. 1929; re-en. Sec. 6708, R.C.M. 1935; R.C.M. 1947, 67-409.**

## Part 2

## Commercial

**70-26-201. Term of lease when none specified.** A hiring of real property, other than lodgings and dwelling houses, in places where there is no usage on the subject, is presumed to be for 1 year from its commencement unless otherwise expressed in the hiring.

**History: En. Sec. 2622, Civ. C. 1895; re-en. Sec. 5228, Rev. C. 1907; re-en. Sec. 7743, R.C.M. 1921; Cal. Civ. C. Sec. 1943; re-en. Sec. 7743, R.C.M. 1935; R.C.M. 1947, 42-203.**

**70-26-202. Rent — when payable.** When there is no usage or contract to the contrary, rents are payable at the termination of the holding when it does not exceed 1 year. If the holding is by the day, week, month, quarter, or year, rent is payable at the termination of the respective periods, as it successively becomes due.

**History: En. Sec. 2626, Civ. C. 1895; re-en. Sec. 5232, Rev. C. 1907; re-en. Sec. 7747, R.C.M. 1921; Cal. Civ. C. Sec. 1947; re-en. Sec. 7747, R.C.M. 1935; R.C.M. 1947, 42-207.**

**70-26-203. Failure of lessor to repair — lessee's remedies.** If, within a reasonable time after notice to the lessor of dilapidations which he ought to repair, he neglects to do so, the lessee may repair the same himself, where the costs of such repairs do not require an expenditure greater than 1 month's rent of the premises, and deduct the expenses of such repairs from the rent, or the lessee may vacate the premises, in which case he shall be discharged from further payment of rent or performance of other conditions.

**History: En. Sec. 2621, Civ. C. 1895; re-en. Sec. 5227, Rev. C. 1907; re-en. Sec. 7742, R.C.M. 1921; Cal. Civ. C. Sec. 1942; Based on Field Civ. C. Sec. 991; re-en. Sec. 7742, R.C.M. 1935; R.C.M. 1947, 42-202.**

**70-26-204. Renewal of lease by lessee's continued possession.** If a lessee of real property remains in possession thereof after the expiration of the hiring and the lessor accepts a rent from him, the parties are presumed to have renewed the hiring on the same terms and for the same time, not exceeding 1 month when the rent is payable monthly, or in any case 1 year.

**History: En. Sec. 2624, Civ. C. 1895; re-en. Sec. 5230, Rev. C. 1907; re-en. Sec. 7745, R.C.M. 1921; Cal. Civ. C. Sec. 1945; Based on Field Civ. C. Sec. 994; re-en. Sec. 7745, R.C.M. 1935; R.C.M. 1947, 42-205.**

**70-26-205. Notice required to terminate lease.** A hiring of real property for a term not specified by the parties is deemed to be renewed as stated in 70-26-204 at the end of the term implied by law unless one of the parties gives notice to the other of his intention to terminate the same at least as long before the expiration thereof as the term of the hiring itself, not exceeding 1 month.

**History: En. Sec. 2625, Civ. C. 1895; re-en. Sec. 5231, Rev. C. 1907; re-en. Sec. 7746, R.C.M. 1921; Cal. Civ. C. Sec. 1946; Based on Field Civ. C. Sec. 995; re-en. Sec. 7746, R.C.M. 1935; R.C.M. 1947, 42-206.**

**70-26-206. Rights of tenant for years or at will.** (1) A tenant for years or at will, unless he is a wrongdoer by holding over, may occupy the buildings, take the annual products of the soil, work mines and quarries open at the commencement of his tenancy; and a tenant at will or for an indefinite term may cultivate and harvest the crops growing at the end of his tenancy.

(2) A tenant for years or at will has no other rights to the property than such as are given to him by the agreement or instrument by which his tenancy is acquired or by subsection (1).

**History: (1)En. Sec. 1271, Civ. C. 1895; re-en. Sec. 4519, Rev. C. 1907; re-en. Sec. 6761, R.C.M. 1921; Cal. Civ. C. Sec. 819; Based on Field Civ. C. Sec. 258; re-en. Sec. 6761, R.C.M. 1935; Sec. 67-702, R.C.M. 1947; (2)En. Sec. 1272, Civ. C. 1895; re-en. Sec. 4520, Rev. C. 1907; re-en. Sec. 6762, R.C.M. 1921; Cal. Civ. C. Sec. 820; Field Civ. C. Sec. 259; re-en. Sec. 6762, R.C.M. 1935; Sec. 67-703, R.C.M. 1947; R.C.M. 1947, 67-702, 67-703.**

**70-26-207. Agricultural leases for more than 10 years void.** No lease or grant of agricultural lands for agricultural purposes for a longer period than 10 years, in which shall be reserved any rent or service of any kind, shall be valid, provided that the foregoing shall not limit or affect leases with option to purchase made by the farm security administration of the United States department of agriculture, but leases or grants of lands lying outside the limits of cities and towns, for any purpose other than for agricultural purposes, may be for such period as may be agreed to by the parties to such leases or grants.

**History: En. Sec. 1152, Civ. C. 1895; re-en. Sec. 4465, Rev. C. 1907; amd. Sec. 1, Ch. 172, L. 1919; re-en. Sec. 6707, R.C.M. 1921; Cal. Civ. C. Sec. 717; re-en. Sec. 6707, R.C.M. 1935; amd. Sec. 1, Ch. 151, L. 1941; R.C.M. 1947, 67-408.**

# CHAPTER 27

# FORCIBLE ENTRY AND DETAINER UNLAWFUL DETAINER

### Part 1 — Definitions and Preliminary Procedure

Section

70-27-101. Jurisdiction.
70-27-102. Forcible entry defined.
70-27-103. Forcible detainer defined.
70-27-104. Tenancy at will — termination by notice.
70-27-105. Remedies of landlord after notice.
70-27-106. Reentry — when and how to be made.
70-27-107. Action for possession under right of reentry — notice not required.
70-27-108. Unlawful detainer defined.
70-27-109. General rules of practice applicable.
70-27-110. Service of notice — how made.
70-27-111. Parties defendant.
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## Part 1

## Definitions and Preliminary Procedure

**70-27-101. Jurisdiction.** The district court of the county in which the property or some part of it is situated shall have jurisdiction of proceedings under this chapter, provided that justices' courts, within their respective counties, shall have concurrent jurisdiction.

**History: En. Sec. 2084, C. Civ. Proc. 1895; re-en. Sec. 7273, Rev. C. 1907; re-en. Sec. 9891, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1163; re-en. Sec. 9891, R.C.M. 1935; amd. Sec. 26, Ch. 491, L. 1973; R.C.M. 1947, 93-9705.**

**70-27-102. Forcible entry defined.** Every person is guilty of a forcible entry who either:

(1) by breaking open doors, windows, or other parts of a house or by any kind of violence or circumstance of terror enters upon or into any real property or mining claim; or

(2) after entering peaceably upon real property or mining claim, turns out by force, threats, or menacing conduct the party in possession.

**History: En. Sec. 2080, C. Civ. Proc. 1895; re-en. Sec. 7269, Rev. C. 1907; re-en. Sec. 9887, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1159; re-en. Sec. 9887, R.C.M. 1935; R.C.M. 1947, 93-9701.**

**70-27-103. Forcible detainer defined.** Every person is guilty of a forcible detainer who either:

(1) by force or by menaces and threats of violence unlawfully holds and keeps the possession of any real property or mining claim, whether the same was acquired peaceably or otherwise; or

(2) in the nighttime or during the absence of the occupant of any lands or mining claim unlawfully enters upon real property and, after demand made for the surrender thereof, for the period of 5 days refuses to surrender the same to such former occupant. The occupant of real property or mining claim, within the meaning of this subsection, is one who, within 5 days preceding such unlawful entry, was in the peaceable and undisputed possession of such lands.

**History: En. Sec. 2081, C. Civ. Proc. 1895; re-en. Sec. 7270, Rev. C. 1907; re-en. Sec. 9888, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1160; re-en. Sec. 9888, R.C.M. 1935; R.C.M. 1947, 93-9702.**

**70-27-104. Tenancy at will — termination by notice.** A tenancy or other estate at will, however created, may be terminated by the landlord's giving notice in writing to the tenant, in the manner prescribed in this chapter, to remove from the premises within a period of not less than 1 month, to be specified in the notice;

but none of the estates or tenancies embraced by the provisions of 70-15-202(4) is a tenancy or estate at will.

**History: En. Sec. 1240, Civ. C. 1895; re-en. Sec. 4502, Rev. C. 1907; re-en. Sec. 6744, R.C.M. 1921; Cal. Civ. C. Sec. 789; Based on Field Civ. C. Sec. 240; amd. Sec. 1, Ch. 50, L. 1931; re-en. Sec. 6744, R.C.M. 1935; R.C.M. 1947, 67-523.**

**70-27-105. Remedies of landlord after notice.** After such notice has been served and the period specified by such notice has expired, but not before, the landlord may reenter or proceed according to law to recover possession.

**History: En. Sec. 1241, Civ. C. 1895; re-en. Sec. 4503, Rev. C. 1907; re-en. Sec. 6745, R.C.M. 1921; Cal. Civ. C. Sec. 790; Based on Field Civ. C. Sec. 242; re-en. Sec. 6745, R.C.M. 1935; R.C.M. 1947, 67-524.**

**70-27-106. Reentry — when and how to be made.** Whenever the right of reentry is given to the grantor or lessor in any grant or lease or otherwise, such reentry may be made at any time after the right has accrued, upon 3 days' notice, as provided in this chapter.

**History: En. Sec. 1242, Civ. C. 1895; re-en. Sec. 4504, Rev. C. 1907; re-en. Sec. 6746, R.C.M. 1921; Cal. Civ. C. Sec. 791; Based on Field Civ. C. Sec. 243; re-en. Sec. 6746, R.C.M. 1935; R.C.M. 1947, 67-525.**

**70-27-107. Action for possession under right of reentry — notice not required.** An action for the possession of real property leased or granted with a right of reentry may be maintained at any time in the district court, after the right to reenter has accrued, without the notice prescribed in 70-27-106.

**History: En. Sec. 1244, Civ. C. 1895; re-en. Sec. 4506, Rev. C. 1907; re-en. Sec. 6748, R.C.M. 1921; Cal. Civ. C. Sec. 793; Field Civ. C. Sec. 244; re-en. Sec. 6748, R.C.M. 1935; R.C.M. 1947, 67-527.**

**70-27-108. Unlawful detainer defined.** A tenant of real property or mining claim, for a term less than life, is guilty of unlawful detainer:

(1) when he continues in possession, in person or by subtenant, of the property or any part thereof after the expiration of the term for which it is let to him without the permission of the landlord or the successor in estate of his landlord, if any there be, but in case of a tenancy at will, it must first be terminated by notice, as prescribed in 70-27-104;

(2) where he continues in possession, in person or by subtenant, without permission of his landlord or the successor in estate of his landlord, if any there be, after default in the payment of rent, pursuant to the lease or agreement under which the property is held, and 3 days' notice in writing requiring its payment, stating the amount which is due, or possession of the property shall have been served upon him and, if there be a subtenant in actual occupation of the premises, also upon such subtenant. Such notice may be served at any time within 1 year after the rent becomes due. In all cases of tenancy upon agricultural lands where the tenant has held over and retained possession for more than 60 days after the expiration of his term without any demand of possession or notice to quit by the landlord or the successor in estate of his landlord, if any there be, he shall be deemed to be holding by permission of the landlord or the successor in estate of his landlord and shall be entitled to hold under the terms of the lease for another full year and shall not be guilty of an unlawful detainer during said year, and such holding over for the period aforesaid shall be taken and construed as a consent on the part of a tenant to hold for another year;

(3) when he continues in possession, in person or by subtenant, after a neglect or failure to perform other conditions or covenants of the lease or agreement under

which the property is held, including any covenant not to assign or sublet, than the one for the payment of rent, and 3 days' notice in writing, requiring the performance of such conditions or covenants or the possession of the property, shall have been served upon him and, if there be a subtenant in actual occupation of the premises, also upon such subtenant. Within 3 days after the serving of the notice, the tenant or any subtenant in actual occupation of the premises or any mortgagee of the term or other person interested in its continuance may perform the conditions or covenants of the lease or pay the stipulated rent, as the case may be, and thereby save the lease from forfeiture. If the covenants and conditions of the lease violated by the lessee cannot afterward be performed, then no notice, as last prescribed herein, need be given to said lessee or his subtenant demanding the performance of the violated covenant or conditions of the lease. A tenant may take proceedings similar to those prescribed in this chapter to obtain possession of the premises let to an undertenant in case of his unlawful detention of the premises underlet to him. Any tenant or subtenant assigning or subletting or committing waste upon the demised premises contrary to the covenants of his lease thereby terminates the lease, and the landlord or his successor in estate shall, upon service of 3 days' notice to quit upon the person or persons in possession, be entitled to restitution of possession of such demised premises under the provisions of this chapter.

**History: En. Sec. 658, p. 174, Bannack Stat.; re-en. Sec. 647, p. 165, Cod. Stat. 1871; re-en. Sec. 707, 1st Div. Rev. Stat. 1879; re-en. Sec. 727, 1st Div. Comp. Stat. 1887; en. Sec. 2082, C. Civ. Proc. 1895; re-en. Sec. 7271, Rev. C. 1907; re-en. Sec. 9889, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1161; re-en. Sec. 9889, R.C.M. 1935; R.C.M. 1947, 93-9703.**

**70-27-109. General rules of practice applicable.** Except as otherwise provided in this chapter, provisions of [93-2301 to 93-8717] are applicable to and constitute the rules of practice mentioned in this chapter.

**History: En. Sec. 2097, C. Civ. Proc. 1895; re-en. Sec. 7286, Rev. C. 1907; re-en. Sec. 9904, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1177; re-en. Sec. 9904, R.C.M. 1935; R.C.M. 1947, 93-9718.**

**70-27-110. Service of notice — how made.** (1) The notices required by 70-27-108 may be served, either:

(a) by delivering a copy to the tenant personally;

(b) if he be absent from his place of residence and from his usual place of business, by leaving a copy with some person of suitable age and discretion at either place and sending a copy through the mail addressed to the tenant at his place of residence; or

(c) if such place of residence and business cannot be ascertained or a person of suitable age or discretion there cannot be found, then by affixing a copy in a conspicuous place on the property and also delivering a copy to a person there residing if such person can be found and also sending a copy through the mail addressed to the tenant at the place where the property is situated.

(2) Service upon a subtenant may be made in the same manner.

**History: En. Sec. 2083, C. Civ. Proc. 1895; re-en. Sec. 7272, Rev. C. 1907; re-en. Sec. 9890, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1162; re-en. Sec. 9890, R.C.M. 1935; R.C.M. 1947, 93-9704.**

**70-27-111. Parties defendant.** (1) No person other than the tenant of the premises and subtenant, if there be one, in the actual occupation of the premises when the complaint is filed need be made parties defendant in the proceeding, nor shall any proceeding abate or the plaintiff be nonsuited for the nonjoinder of any person who might have been made party defendant; but when it appears that any of the parties served with process or appearing in the proceeding is guilty of the offense charged, judgment must be rendered against such party.

(2) In case a defendant has become a subtenant of the premises in controversy after the service of the notice provided for by 70-27-108(2) upon the tenant of the premises, the fact that such notice was not served on each subtenant shall constitute no defense to the action.

(3) In case a married person is a tenant or subtenant, failure to join such person's spouse shall constitute no defense; but in case the spouse is not joined, an execution issued upon a personal judgment against the tenant or subtenant can only be enforced against property on the premises at the commencement of the action or against property that is owned solely by the tenant or subtenant and not by his spouse.

(4) All persons who enter the premises under the tenant after the commencement of the action shall be bound by the judgment the same as if he or they had been made party to the action.

**History: En. Sec. 2085, C. Civ. Proc. 1895; re-en. Sec. 7274, Rev. C. 1907; re-en. Sec. 9892, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1164; re-en. Sec. 9892, R.C.M. 1935; amd. Sec. 58, Ch. 535, L. 1975; R.C.M. 1947, 93-9706.**

**70-27-112. Applicability of general provisions on parties.** Except as provided in 70-27-111, the provisions of Title 25 relating to parties to civil actions are applicable to this proceeding.

**History: En. Sec. 2086, C. Civ. Proc. 1895; re-en. Sec. 7275, Rev. C. 1907; re-en. Sec. 9893, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1165; re-en. Sec. 9893, R.C.M. 1935; R.C.M. 1947, 93-9707.**

**70-27-113. Complaint and summons.** (1) The plaintiff, in his complaint, which must be in writing, must set forth the facts on which he seeks to recover and describe the premises with reasonable certainty and may set forth therein any circumstances of fraud, force, or violence which may have accompanied the alleged forcible entry or forcible or unlawful detainer and claim damages therefor. In case the unlawful detainer charged be after default in the payment of rent, the complaint must state the amount of such rent.

(2) Upon filing the complaint, a summons must be issued thereon as in other cases, returnable at a date designated therein, which shall not be less than 4 days or more than 12 days from its date.

**History: En. Sec. 2087, C. Civ. Proc. 1895; re-en. Sec. 7276, Rev. C. 1907; re-en. Sec. 9894, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1166; re-en. Sec. 9894, R.C.M. 1935; R.C.M. 1947, 93-9708(part).**

**70-27-114. Summons — contents — service.** (1) The summons must:

(a) state the parties to the proceeding, the court in which the same is brought, the nature of the action in concise terms, and the relief sought and also the return day; and

(b) notify the defendant to appear and answer within the time designated or that the relief sought will be taken against him.

(2) The summons must be directed to the defendant and be served at least 4 days before the return day designated therein and must be served and returned in the same manner as summons in civil actions is served and returned.

(3) The summons must be served personally upon the defendants if within the state; if not within the state, in the same manner as notices are required to be served in 70-27-110. The complaint need not be served.

(4) Upon the return of any summons issued under this chapter, where the same has not for any reason been served or not served in time, the plaintiff may have a new summons issued, the same as if no previous summons had been issued.

**History: (1), (2), (4)En. Sec. 2088, C. Civ. Proc. 1895; re-en. Sec. 7277, Rev. C. 1907; re-en. Sec. 9895, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1167; re-en. Sec. 9895, R.C.M. 1935; Sec. 93-9709, R.C.M. 1947; (3)En. Sec. 2087, C. Civ. Proc. 1895; re-en. Sec. 7276, Rev. C. 1907; re-en. Sec. 9894, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1166; re-en. Sec. 9894, R.C.M. 1935; Sec. 93-9708, R.C.M. 1947; R.C.M. 1947, 93-9708(part), 93-9709.**

**70-27-115. Defendant's appearance and answer.** On or before the day fixed for his appearance, the defendant may appear and answer or demur.

**History: En. Sec. 2090, C. Civ. Proc. 1895; re-en. Sec. 7279, Rev. C. 1907; re-en. Sec. 9897, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1170; re-en. Sec. 9897, R.C.M. 1935; R.C.M. 1947, 93-9711.**

**70-27-116. Verification of complaint and answer.** The complaint and answer must be verified. If new matter be set up in the answer, it is deemed denied.

**History: En. Sec. 2095, C. Civ. Proc. 1895; re-en. Sec. 7284, Rev. C. 1907; re-en. Sec. 9902, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1175; re-en. Sec. 9902, R.C.M. 1935; R.C.M. 1947, 93-9716.**

**70-27-117. Judgment by default.** If at the time appointed the defendant does not appear and defend, the court must enter his default and enter judgment in favor of the plaintiff as prayed for in the complaint.

**History: En. Sec. 2089, C. Civ. Proc. 1895; re-en. Sec. 7278, Rev. C. 1907; re-en. Sec. 9896, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1169; re-en. Sec. 9896, R.C.M. 1935; R.C.M. 1947, 93-9710.**

## Part 2

## Trial, Judgment, and Appeal

**70-27-201. Trial by jury.** Whenever an issue of fact is presented by the pleadings, it must be tried by a jury unless such jury be waived as in other cases. The jury shall be formed in the same manner as other trial juries in the court in which the action is pending.

**History: En. Sec. 2091, C. Civ. Proc. 1895; re-en. Sec. 7280, Rev. C. 1907; re-en. Sec. 9898, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1171; re-en. Sec. 9898, R.C.M. 1935; R.C.M. 1947, 93-9712.**

**70-27-202. Actions in justice's court to be tried within 10 days.** (1) Actions filed in justice's court under this chapter shall be tried within 10 days after the appearance or answer date stated in the summons unless the defendant applying for a continuance shall give an undertaking to the adverse party with good and sufficient security to be approved by the court, conditioned for the payment of all damages and rent that may accrue if judgment be rendered against the defendant.

(2) The plaintiff and defendant may stipulate to a continuance of the trial beyond the limit of this section without the necessity of an undertaking.

**History: En. 93-9712.1 by Sec. 1, Ch. 166, L. 1977; R.C.M. 1947, 93-9712.1.**

**70-27-203. Showings required on trial.** On the trial of any proceeding for any forcible entry or forcible detainer, the plaintiff shall only be required to show, in addition to the forcible entry or forcible detainer complained of, that he was peaceably in the actual possession at the time of the forcible entry or was entitled to the possession at the time of the forcible detainer. The defendant may show in his defense that he or his ancestors or those whose interest in such premises he claims have been in the quiet possession thereof for the space of 1 whole year together next before the commencement of the proceedings and that his interest therein is not then ended or determined, and such showing is a bar to the proceedings.

**History: En. Sec. 654, p. 173, Bannack Stat.; re-en. Sec. 643, p. 164, Cod. Stat. 1871; re-en. Sec. 703, 1st Div. Rev. Stat. 1879; re-en. Sec. 723, 1st Div. Comp. Stat. 1887; amd. Sec. 2092, C. Civ. Proc. 1895; re-en. Sec. 7281, Rev. C. 1907; re-en. Sec. 9899, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1172; re-en. Sec. 9899, R.C.M. 1935; R.C.M. 1947, 93-9713.**

**70-27-204. Amendment of complaint after trial begins.** (1) When, upon the trial of any proceeding under this chapter, it appears from the evidence that the defendant has been guilty of either forcible entry or forcible or unlawful detainer and other than the offense charged in the complaint, the judge must order that such complaint be forthwith amended to conform with such proof. Such amendment must be made without any imposition of terms.

(2) No continuance shall be permitted on account of such amendment unless the defendant by affidavit filed shows to the satisfaction of the court good cause therefor.

**History: En. Sec. 2093, C. Civ. Proc. 1895; re-en. Sec. 7282, Rev. C. 1907; re-en. Sec. 9900, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1173; re-en. Sec. 9900, R.C.M. 1935; R.C.M. 1947, 93-9714.**

**70-27-205. Verdict, judgment, and execution.** (1) If upon the trial the verdict of the jury or, if the case be tried without a jury, the finding of the court be in favor of the plaintiff and against the defendant, judgment shall be entered for the restitution of the premises; and if the proceeding be for an unlawful detainer after neglect or failure to perform the conditions or covenants of the lease or agreement under which the property is held or after default in the payment of rent, the judgment shall also declare the forfeiture of such lease or agreement.

(2) The jury, or the court if the proceeding be tried without a jury, shall also assess the damages occasioned to the plaintiff by any forcible entry or by any forcible or unlawful detainer alleged in the complaint and proved on the trial and find the amount of any rent due if the alleged unlawful detainer be after default in the payment of rent; and the judgment shall be rendered against the defendant, guilty of the forcible entry or forcible or unlawful detainer, for three times the amount of the damages thus assessed and of the rent found due.

(3) When the proceeding is for an unlawful detainer after default in the payment of the rent and the lease or agreement under which the rent is payable has not by its terms expired, execution upon the judgment shall not be issued until the expiration of 5 days after the entry of the judgment, within which time the tenant or any subtenant or any mortgagee of the term or other party interested in its continuance may pay into court for the landlord the amount found due as rent with interest thereon and the amount of damages found by the jury or the court for the unlawful detainer and the costs of the proceeding, and thereupon the judgment shall be satisfied and the tenant be restored to his estate; but if payment, as here provided, be not made within the 5 days, the judgment may be enforced for its full

amount and for the possession of the premises. In all other cases the judgment may be enforced immediately.

**History: En. Sec. 2094, C. Civ. Proc. 1895; re-en. Sec. 7283, Rev. C. 1907; re-en. Sec. 9901, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1174; re-en. Sec. 9901, R.C.M. 1935; R.C.M. 1947, 93-9715.**

**70-27-206. Treble damages.** If a person recover damages for a forcible or unlawful entry in or upon or detention of any building or cultivated real property, judgment may be entered for three times the amount at which the actual damages are assessed.

**History: En. Sec. 232, p. 91, Bannack Stat.; re-en. Sec. 253, p. 187, L. 1867; re-en. Sec. 302, p. 93, Cod. Stat. 1871; re-en. Sec. 353, L. 1877; re-en. Sec. 353, 1st Div. Rev. Stat. 1879; re-en. Sec. 365, 1st Div. Comp. Stat. 1887; re-en. Sec. 1304, C. Civ. Proc. 1895; re-en. Sec. 6869, Rev. C. 1907; re-en. Sec. 9478, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 735; re-en. Sec. 9478, R.C.M. 1935; R.C.M. 1947, 93-6105.**

**70-27-207. Holdover or collusion after notice — treble rent.** If any tenant or any person in collusion with the tenant holds over any lands or tenements after demand made and 1 month's notice in writing given, requiring the possession thereof, such person holding over must pay to the landlord treble rent during the time he continues in possession after such notice.

**History: En. Sec. 4351, Civ. C. 1895; re-en. Sec. 6077, Rev. C. 1907; re-en. Sec. 8695, R.C.M. 1921; Cal. Civ. C. Sec. 3345; re-en. Sec. 8695, R.C.M. 1935; R.C.M. 1947; 17-502.**

**70-27-208. Holdover after tenant's notice to quit — treble rent.** If any tenant gives notice of his intention to quit the premises and does not deliver up the possession at the time specified in the notice, he must pay to the landlord treble rent during the time he continues in possession after such notice.

**History: En. Sec. 4350, Civ. C. 1895; re-en. Sec. 6076, Rev. C. 1907; re-en. Sec. 8694, R.C.M. 1921; Cal. Civ. C. Sec. 3344; re-en. Sec. 8694, R.C.M. 1935; R.C.M. 1947, 17-501.**

**70-27-209. Treble rent exclusive of interest.** The damages prescribed by 70-27-207 and 70-27-208 are exclusive of exemplary damages and interest.

**History: En. Sec. 4364, Civ. C. 1895; re-en. Sec. 6085, Rev. C. 1907; re-en. Sec. 8703, R.C.M. 1921; Cal. Civ. C. Sec. 3357; Field Civ. C. Sec. 1876; re-en. Sec. 8703, R.C.M. 1935; R.C.M. 1947, 17-605(part).**

**70-27-210. Relief against forfeiture of lease in case of hardship.** (1) The court may relieve a tenant against a forfeiture of a lease and restore him to his former estate in case of hardship where application for such relief is made within 30 days after the forfeiture is declared by the judgment of the court, as provided in 70-27-205.

(2) The application may be made by a tenant or subtenant or mortgagee of the term or any person interested in the continuance of the term. It must be made upon petition, setting forth the facts upon which relief is sought, and be verified by the applicant.

(3) Notice of the application with a copy of the petition must be served on the plaintiff in the judgment, who may appear and contest the application.

(4) In no case shall the application be granted except on condition that full payment of rent due or full performance of conditions or covenants stipulated, so far as the same is practicable, be made.

**History: En. Sec. 2099, C. Civ. Proc. 1895; re-en. Sec. 7288, Rev. C. 1907; re-en. Sec. 9906, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1179; re-en. Sec. 9906, R.C.M. 1935; R.C.M. 1947, 93-9720.**

**70-27-211. Appeal.** An appeal may be taken by the plaintiff or defendant as in other cases.

**History: En. Sec. 2096, C. Civ. Proc. 1895; re-en. Sec. 7285, Rev. C. 1907; re-en. Sec. 9903, R.C.M. 1921; re-en. Sec. 9903, R.C.M. 1935; R.C.M. 1947, 93-9717.**

**70-27-212. General provisions on new trials and appeals applicable.** The provisions of Title 25 relative to new trials and appeals, except insofar as they are inconsistent with the provisions of this chapter, apply to the proceedings mentioned in this chapter.

**History: En. Sec. 2098, C. Civ. Proc. 1895; re-en. Sec. 7287, Rev. C. 1907; re-en. Sec. 9905, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1178; re-en. Sec. 9905, R.C.M. 1935; R.C.M. 1947, 93-9719.**

## CHAPTER 28

## QUIETING TITLE TO REAL PROPERTY

### Part 1 — Quieting Title Generally

Section
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## Part 1

## Quieting Title Generally

**70-28-101. Quiet title action authorized.** An action may be brought and prosecuted to final decree, judgment, or order by any person or persons, whether in actual possession or not, claiming title to real estate against any person or persons, both known and unknown, who claim or may claim any right, title, estate, or interest therein or lien or encumbrance thereon adverse to plaintiff's ownership or any cloud upon plaintiff's title thereto, whether such claim or possible claim be present or contingent, including any claim or possible claim of dower, inchoate or accrued, for the purpose of determining such claim or possible claim and quieting the title to said real estate.

**History: En. Sec. 233, p. 92, Bannack Stat.; re-en. Sec. 254, p. 188, L. 1867; re-en. Sec. 303, p. 94, Cod. Stat. 1871; re-en. Sec. 354, p. 138, L. 1877; re-en. Sec. 354, 1st Div. Rev. Stat. 1879; re-en. Sec. 366, 1st Div. Comp. Stat. 1887; amd. Sec. 1310, C. Civ. Proc. 1895; re-en. Sec. 6870, Rev. C. 1907; amd. Sec. 1, Ch. 113, L. 1915; re-en. Sec. 9479, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 738; amd. Sec. 1, Ch. 70, L. 1931; re-en. Sec. 9479, R.C.M. 1935; R.C.M. 1947, 93-6203(part).**

**70-28-102. General procedural provisions applicable.** The provisions of [93-3001 to 93-3020, inclusive,] and Rules 4, 12(a), and 41(e), M.R.Civ.P., so far as the same are not in conflict with this part, are hereby made applicable to the action herein provided for.

**History: En. Sec. 2, Ch. 113, L. 1915; re-en. Sec. 9486, R.C.M. 1921; re-en. Sec. 9486, R.C.M. 1935; R.C.M. 1947, 93-6209.**

**70-28-103. Venue.** All actions brought under 70-28-101 must be brought in the county in which the real estate or a portion thereof, as to which the title is sought to be quieted, is situated; provided that if the real estate is situated in more than one county, said action may be brought and prosecuted in either of said counties, and a transcript of the original judgment certified by the clerk of court shall be filed in the office of the clerk of court in the county other than which the action was brought in which any of the real estate affected thereby is situated.

**History: En. Sec. 233, p. 92, Bannack Stat.; re-en. Sec. 254, p. 188, L. 1867; re-en. Sec. 303, p. 94, Cod. Stat. 1871; re-en. Sec. 354, p. 138, L. 1877; re-en. Sec. 354, 1st Div. Rev. Stat. 1879; re-en. Sec. 366, 1st Div. Comp. Stat. 1887; amd. Sec. 1310, C. Civ. Proc. 1895; re-en. Sec. 6870, Rev. C. 1907; amd. Sec. 1, Ch. 113, L. 1915; re-en. Sec. 9479, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 738; amd. Sec. 1, Ch. 70, L. 1931; re-en. Sec. 9479, R.C.M. 1935; R.C.M. 1947, 93-6203(part).**

**70-28-104. Parties defendant — unknown claimants.** (1) In any action brought under 70-28-101 and 70-28-103, the plaintiff may join as defendants any or all persons, known or unknown, claiming or who might claim any right, title, estate, or interest in or lien or encumbrance upon the real property described in the complaint or any thereof adverse to plaintiff's ownership or any cloud upon plaintiff's title thereto, whether such claim or possible claim be present or contingent, including any claim or possible claim of dower, inchoate or accrued, and including the person or persons in possession if the plaintiff is not in possession.

(2) If the plaintiff shall desire to obtain a complete adjudication of the title to the real estate described in the complaint, he may name as defendants all known persons who assert or who might assert any claim as in this section above specified and may join as defendants all persons unknown who might make any such claim by adding in the caption of the complaint in such action the words "and all other persons, unknown, claiming or who might claim any right, title, estate, or interest in or lien or encumbrance upon the real property described in the complaint or any thereof adverse to plaintiff's ownership or any cloud upon plaintiff's title thereto, whether such claim or possible claim be present or contingent, including any claim or possible claim of dower, inchoate or accrued".

**History: En. Sec. 2, Ch. 113, L. 1915; re-en. Sec. 9480, R.C.M. 1921; re-en. Sec. 9480, R.C.M. 1935; R.C.M. 1947, 93-6204.**

**70-28-105. Maintenance of action when no known claimants.** If in any case there are no known claimants or possible claimants to any of the property involved in any action contemplated by 70-28-101 through 70-28-109, the action may nevertheless be maintained against all persons unknown claiming or who might claim any right, title, estate, or interest in or lien or encumbrance upon the real property described in the complaint or any part thereof adverse to plaintiff's ownership or any cloud upon plaintiff's title thereto, whether such claim or possible claim be present or contingent, including any claim or possible claim of dower, inchoate or accrued, and such action may be prosecuted to judgment in the same manner and with like effect as though there had been known claimants or possible claimants; and in any such case, the complaint, the affidavit for service by publication, the order for service by publication, and the decree shall state the facts and the summons shall be directed to such unknown persons.

**History: En. Sec. 1, Ch. 68, L. 1939; re-en. Sec. 9488.1, R.C.M. 1935; R.C.M. 1947, 93-6212.**

**70-28-106. Notice of action to be filed with clerk and recorder.** Before any order for the publication of summons is granted as provided in Rule 4, M.R.Civ.P., the plaintiff shall file, in the office of the clerk and recorder of each county in which any of the property involved in such action is situated, a notice of the pendency of such action, signed by the plaintiff or his attorney, which notice shall contain:

(1) the title of the court in which such action is filed;
(2) the full caption of the cause;
(3) a complete description of all the property involved in such action; and
(4) a statement of the relief sought by plaintiff.

**History: En. Sec. 2, Ch. 113, L. 1915; re-en. Sec. 9481, R.C.M. 1921; re-en. Sec. 9481, R.C.M. 1935; R.C.M. 1947, 93-6205.**

**70-28-107. Jurisdiction acquired by service — complete adjudication — judgment.** (1) Upon the service of summons on all defendants, known and unknown, in the manner provided in Rule 4, M.R.Civ.P., the court in which such action is tried shall have jurisdiction to make a complete adjudication of the title to the lands named in the complaint and the title to which is sought to be quieted, including jurisdiction to direct:

(a) the cancellation of instruments constituting clouds upon such title;

(b) the execution of conveyances where it appears that any party to such action should execute such conveyance or conveyances;

(c) the execution of satisfactions of mortgages and other apparent liens upon such land or any part thereof; or

(d) the doing of any other act of a personal nature necessary to give effect to the rights of the respective parties to such action, as the same may be adjudicated by the court.

(2) When any judgment or decree shall be rendered in such action for a conveyance, release, or acquittance, as above mentioned, and the party or parties against whom the judgment or decree shall be rendered do not comply therewith within the time specified in said judgment or decree for such compliance, such judgment or decree shall have the same operation and effect and be as available as if the conveyance, release, or acquittance had been executed conformably to such judgment or decree.

**History: En. Sec. 2, Ch. 113, L. 1915; re-en. Sec. 9487, R.C.M. 1921; amd. Sec. 2, Ch. 55, L. 1923; re-en. Sec. 9487, R.C.M. 1935; R.C.M. 1947, 93-6210(part).**

**70-28-108. Prerequisites to decree against defendant not present.** Before plaintiff shall be entitled to a decree in such action against any defendant who shall not appear therein, he must produce evidence sufficient to prima facie entitle him to relief, and relief shall be granted only to the extent to which such evidence shall prima facie prove him to be entitled to the same; but this provision shall not affect the procedure in or manner of trial of such actions as between the plaintiff and any defendant who shall appear in such action.

**History: En. Sec. 2, Ch. 113, L. 1915; re-en. Sec. 9487, R.C.M. 1921; amd. Sec. 2, Ch. 55, L. 1923; re-en. Sec. 9487, R.C.M. 1935; R.C.M. 1947, 93-6210(part).**

**70-28-109. Who bound by judgment.** Every person made a defendant to such action by name and every unknown claimant or possible claimant upon whom service has been made by publication, in accordance with Rule 4, M.R.Civ.P., and who has not appeared in such action shall be bound by the judgment or decree entered in such action, subject to the right of any such defendants to apply for relief in any manner provided by the statutes applicable to the case of a defaulting defendant served only by publication.

**History: En. Sec. 2, Ch. 113, L. 1915; re-en. Sec. 9488, R.C.M. 1921; re-en. Sec. 9488, R.C.M. 1935; R.C.M. 1947, 93-6211.**

**70-28-110. When value of improvements may be allowed as setoff.** When damages are claimed for withholding the property recovered upon which permanent improvements have been made by a defendant or those under whom he claims, holding under color of title adversely to the claim of plaintiff, in good faith, the value of such improvements must be allowed as setoff against such damage.

**History: En. Sec. 236, p. 92, Bannack Stat.; re-en. Sec. 257, p. 188, L. 1867; re-en. Sec. 306, p. 94, Cod. Stat. 1871; re-en. Sec. 357, p. 138, L. 1877; re-en. Sec. 357, 1st Div. Rev. Stat. 1879; re-en. Sec. 369, 1st Div. Comp. Stat. 1887; re-en. Sec. 1313, C. Civ. Proc. 1895; re-en. Sec. 6873, Rev. C. 1907; re-en. Sec. 9491, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 741; re-en. Sec. 9491, R.C.M. 1935; R.C.M. 1947, 93-6215.**

**70-28-111. Termination of plaintiff's right during action — damages for withholding.** In an action for the recovery of real property where the plaintiff shows a right to recover at the time the action was commenced but it appears that his right has terminated during the pendency of the action, the verdict and judgment must be according to the fact and the plaintiff may recover damages for withholding the property.

**History: En. Sec. 235, p. 92, Bannack Stat.; re-en. Sec. 256, p. 188, L. 1867; re-en. Sec. 305, p. 94, Cod. Stat. 1871; re-en. Sec. 356, p. 138, L. 1877; re-en. Sec. 356, 1st Div. Rev. Stat. 1879; re-en. Sec. 368, 1st Div. Comp. Stat. 1887; re-en.**

**Sec. 1312, C. Civ. Proc. 1895; re-en. Sec. 6872, Rev. C. 1907; re-en. Sec. 9490, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 740; re-en. Sec. 9490, R.C.M. 1935; R.C.M. 1947, 93-6214.**

**70-28-112. Costs.** If the defendant in such action disclaim in his answer any interest or estate in the property or suffer judgment to be taken against him without answer, the plaintiff shall not recover costs. But in actions which the plaintiff has brought under section 2326 of the Revised Statutes of the United States to determine an adverse claim, the plaintiff shall recover costs if the defendant does not relinquish in the proper United States land office or disclaim in writing any interest or estate in the property within 20 days from the filing of said adverse claim in such land office.

**History: En. Sec. 234, p. 92, Bannack Stat.; re-en. Sec. 255, p. 188, L. 1867; re-en. Sec. 304, p. 93, Cod. Stat. 1871; re-en. Sec. 355, p. 138, L. 1877; re-en. Sec. 355, 1st Div. Rev. Stat. 1879; amd. Sec. 367, 1st Div. Comp. Stat. 1887; re-en. Sec. 1311, C. Civ. Proc. 1895; re-en. Sec. 6871, Rev. C. 1907; re-en. Sec. 9489, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 739; re-en. Sec. 9489, R.C.M. 1935; R.C.M. 1947, 93-6213.**

**70-28-113. Order for survey or measurement.** (1) The court in which an action is pending for the recovery of real property or mining claims or for damages for an injury or to quiet title or to determine adverse claims thereto or a judge thereof may on motion, upon notice by either party, for good cause shown, grant an order allowing to such party the right to enter into or upon the property or mining claim and make survey or measurement thereof or of any tunnels, shafts, or drifts therein for the purpose of the action even though entry for such purpose has to be made through other lands or mining claims belonging to parties to the action.

(2) The order must describe the property, and a copy thereof must be served on the owner or occupant, and thereupon such party may enter the property, with necessary surveyors and assistants, and make such survey and measurement; but if unnecessary damage be done to the property, he is liable therefor.

**History: (1)En. Sec. 237, p. 92, Bannack Stat.; re-en. Sec. 258, p. 188, L. 1867; re-en. Sec. 307, p. 95, Cod. Stat. 1871; en. Sec. 357, p. 138, L. 1877; re-en. Sec. 357, 1st Div. Rev. Stat. 1879; re-en. Sec. 369, 1st Div. Comp. Stat. 1887; amd. Sec. 1314, C. Civ. Proc. 1895; re-en. Sec. 6874, Rev. C. 1907; re-en. Sec. 9492, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 742; re-en. Sec. 9492, R.C.M. 1935; Sec. 93-6216, R.C.M. 1947; (2)En. Sec. 238, p. 92, Bannack Stat.; re-en. Sec. 259, p. 188, L. 1867; re-en. Sec. 308, p. 95, Cod. Stat. 1871; re-en. Sec. 358, p. 139, L. 1877; re-en. Sec. 358, 1st Div. Rev. Stat. 1879; re-en. Sec. 370, 1st Div. Comp. Stat. 1887; re-en. Sec. 1315, C. Civ. Proc. 1895; re-en. Sec. 6875, Rev. C. 1907; re-en. Sec. 9493, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 743; re-en. Sec. 9493, R.C.M. 1935; Sec 93-6217, R.C.M. 1947; R.C.M. 1947, 93-6216, 93-6217.**

## Part 2

## Property Granted to Heirs of Deceased Entryman — Quiet Title

**70-28-201. Action authorized.** Whenever the government of the United States has granted lands in the state of Montana to the heirs of a deceased entryman, any person who claims an estate of inheritance or interest in such lands may bring and maintain an action in rem against all the world in the district court for the county in which such real property is situated to establish his title to such property and to determine all adverse claims thereto. Any number of separate parcels of land claimed by the plaintiff may be included in the same action.

**History: En. Sec. 1, Ch. 15, L. 1915; re-en. Sec. 9501, R.C.M. 1921; re-en. Sec. 9501, R.C.M. 1935; R.C.M. 1947, 93-6225.**

**70-28-202. General procedural provisions applicable.** Except as herein otherwise provided, all the provisions and rulings of law relating to evidence, pleading, practice, new trials, and appeals applicable to other civil actions shall apply to the actions hereby authorized.

**History: En. Sec. 12, Ch. 15, L. 1915; re-en. Sec. 9512, R.C.M. 1921; re-en. Sec. 9512, R.C.M. 1935; R.C.M. 1947, 93-6236(part).**

**70-28-203. Remedies cumulative.** The remedies provided for by this part shall be deemed cumulative and in addition to any other remedy now or hereafter provided by law for quieting or establishing title to real property.

**History: En. Sec. 14, Ch. 15, L. 1915; re-en. Sec. 9515, R.C.M. 1921; re-en. Sec. 9515, R.C.M. 1935; R.C.M. 1947, 93-6239.**

**70-28-204. Executor, administrator, or guardian as party.** An executor, administrator, or guardian or other person claiming an interest by deed of conveyance or otherwise may maintain, as plaintiff, and may appear and defend in the action herein provided for.

**History: En. Sec. 14, Ch. 15, L. 1915; re-en. Sec. 9514, R.C.M. 1921; re-en. Sec. 9514, R.C.M. 1935; R.C.M. 1947, 93-6238.**

**70-28-205. Complaint.** The action shall be commenced by the filing of a verified complaint in which the parties so commencing the same shall be named as plaintiffs and the defendants shall be described as "all persons claiming any interest in or lien upon the real property herein described or any part thereof" and which shall:

(1) contain a statement of the facts enumerated in 70-28-201;
(2) contain a particular description of such real property; and
(3) specify the estate, title, or interest of the plaintiff therein.

**History: En. Sec. 2, Ch. 15, L. 1915; re-en. Sec. 9502, R.C.M. 1921; re-en. Sec. 9502, R.C.M. 1935; R.C.M. 1947, 93-6226.**

**70-28-206. Affidavit to accompany complaint.** (1) At the time of filing the complaint, the plaintiff shall file with the same his affidavit fully and explicitly setting forth and showing:

(a) the character of his estate, right, title, interest, or claim in the property;

(b) whether or not he has ever made any conveyance of his interest in said property or any part thereof and, if so, when and to whom; also a statement of any and all existing mortgages, deeds of trust, judgments, or other liens thereon;

(c) when and where the deceased entryman of said property died;

(d) what kin or relationship the claimant bore to the entryman at the time of his death; and

(e) the names and residences of any other persons who are next of kin or entitled to succeed to any portion of the lands, the subject of said action, and the names of and residences of all persons who have liens upon the property or any part thereof adversely to the plaintiff if he knows or has been informed or has been able to discover any such person.

(2) If the plaintiff is unable to state any one or more of the matters herein required, he shall set forth and show fully and explicitly the reasons for such inability.

(3) Such affidavit shall constitute a part of the judgment roll.

(4) If the plaintiff be a person under guardianship, the affidavit shall be made by his guardian.

**History: En. Sec. 3, Ch. 15, L. 1915; re-en. Sec. 9503, R.C.M. 1921; re-en. Sec. 9503, R.C.M. 1935; R.C.M. 1947, 93-6227.**

**70-28-207. Summons — issuance and form.** Upon the filing of the complaint and affidavit, a summons must be issued under the seal of the court, which shall contain the name of the court and county in which the action is brought, the name of the plaintiff, and the particular description of the real property involved and shall be directed to "all persons claiming any interest in or lien upon the real property herein described or any part thereof" as defendants and shall be substantially in the following form:

"In the district court of the .... judicial district of the state of Montana, in and for the county of ..... Plaintiff, vs. all persons claiming any interest in or lien upon the real property herein described or any part thereof, defendants.

The state of Montana to all persons claiming any interest in or lien upon the real property herein described or any part thereof, defendants, Greeting:

You are hereby required to appear and answer the complaint of ...., plaintiff, filed with the clerk of the above-entitled court, within 60 days after the first publication of this summons, and set forth what interest or lien, if any, you have in or upon that certain real property or any part thereof situated in the county of ...., state of Montana, particularly described as follows: (Here insert description.)

And you are hereby notified that, unless you so appear and answer, the plaintiff will apply to the court for the relief demanded in the complaint, to wit: (Here insert a statement of the relief so demanded.)

Witness my hand and the seal of said court this ....... day of ...., A.D. 19...

..............., Clerk"

**History: En. Sec. 4, Ch. 15, L. 1915; re-en. Sec. 9504, R.C.M. 1921; re-en. Sec. 9504, R.C.M. 1935; R.C.M. 1947, 93-6228.**

**70-28-208. Publication and posting of summons.** (1) The summons shall be published in a newspaper of general circulation published in the county in which the action is brought. The newspaper in which such publication is to be made shall be designated by an order of the court or judge thereof to be signed and filed with the clerk. No other order for the publication of the summons shall be necessary, nor shall any affidavit therefor be required, nor need any copy of the complaint be served, except as hereinafter required. The summons shall be published at least once a week for a period of 5 weeks and to each publication thereof shall be appended a memorandum, signed by the plaintiff's attorney, in substance as follows "The following persons are said to claim an interest in or lien upon said property, adverse to plaintiff." (Give names and addresses as above provided.)

(2) A copy of the summons together with a copy of the foregoing memorandum shall be posted in a conspicuous place on each separate parcel of the property described in the complaint within 10 days after the first publication of the summons.

**History: En. Sec. 5, Ch. 15, L. 1915; re-en. Sec. 9505, R.C.M. 1921; re-en. Sec. 9505, R.C.M. 1935; R.C.M. 1947, 93-6229.**

**70-28-209. Personal service of summons — service by mail.** (1) If the affidavit discloses the name of any person next of kin or relationship to the deceased entryman or entitled to succeed to any part of said property or the name of a person who claims or may claim an interest by mortgage, trust deed, judgment, or other lien, the summons shall also be personally served upon such person, if he can be found within the state, together with a copy of the complaint and a copy of said affidavit, during the period of the publication of the summons, and to the copy of the summons delivered to any such person there shall be appended a copy of the memorandum provided in 70-28-208.

(2) If such person resides out of the state, a copy of the summons, memorandum, complaint, and affidavit shall be, within 10 days after the first publication of the summons, deposited in the United States post office, enclosed in a sealed envelope, postage prepaid, addressed to such person at the address given in the affidavit or, if no address be given therein, then at the county seat of the county in which the action was brought. If such person resides within the state and could not with due diligence be found within the state within the period of the publication of the summons, then said notice aforesaid shall be mailed to him, as above provided, forthwith upon the expiration of said period of said publication.

**History: En. Sec. 6, Ch. 15, L. 1915; re-en. Sec. 9506, R.C.M. 1921; re-en. Sec. 9506, R.C.M. 1935; R.C.M. 1947, 93-6230.**

**70-28-210. Jurisdiction acquired by service — complete.** Upon the completion of the publication and posting of the summons and its service upon and mailing to the persons, if any, upon whom it is hereby directed to be so specially served, the court shall have full and complete jurisdiction over the plaintiff and the property and of the person of every one having or claiming any estate, right, title, or interest in or to or lien upon such property or any part thereof and shall be deemed to have obtained the possession and control of said property for the purposes of the action and shall have full and complete jurisdiction to render the judgment therein which is provided for in this part.

**History: En. Sec. 7, Ch. 15, L. 1915; re-en. Sec. 9507, R.C.M. 1921; re-en. Sec. 9507, R.C.M. 1935; R.C.M. 1947, 93-6231.**

**70-28-211. Depositions.** (1) At any time after the issuance of the summons, any party to the action may take depositions therein in conformity to law, upon notice to the adverse party sought to be bound by such depositions and who has appeared in the action, if any, and upon notice filed with the clerk.

(2) The depositions may be used by any party against any other party giving or receiving the notice (except the clerk), subject to all just exceptions.

**History: En. Sec. 12, Ch. 15, L. 1915; re-en. Sec. 9512, R.C.M. 1921; re-en. Sec. 9512, R.C.M. 1935; R.C.M. 1947, 93-6236(part).**

**70-28-212. Time for appearance by defendant — answer.** At any time within the first 60 days from the first publication of the summons or within such further time, not exceeding 30 days, as the court may for good cause grant, any person having or claiming any estate, right, title, or interest in or to or lien upon said property or any part thereof may appear and make himself a party to the action by pleading to the complaint. All answers must be verified and set forth specifically the kin or relationship of the deceased entryman and the estate, right, title, interest, or lien so claimed.

**History: En. Sec. 8, Ch. 15, L. 1915; re-en. Sec. 9508, R.C.M. 1921; re-en. Sec. 9508, R.C.M. 1935; R.C.M. 1947, 93-6232.**

**70-28-213. Recording of notice by plaintiff and defendant.** (1) The plaintiff must, at the time of filing the complaint, and every defendant to claim or claiming any affirmative relief must, at the time of filing his answer, record in the office of the county clerk and recorder of the county in which the property is situated a notice of the pendency of the action containing the object of the action or the defense and a particular description of the property affected thereby.

(2) The clerk and recorder shall record the same in a book of the miscellaneous records of his office and make a reference as to the date and time of the filing of such notice and, when recorded, to the book and page record thereof.

**History: En. Sec. 9, Ch. 15, L. 1915; re-en. Sec. 9509, R.C.M. 1921; re-en. Sec. 9509, R.C.M. 1935; R.C.M. 1947, 93-6233.**

**70-28-214. Default judgment prohibited — proof and inquiry required.** No judgment in any such action shall be given by default, but the court must require proof of the facts alleged in the complaint and other pleadings, and the court must further make diligent inquiry of the plaintiff and all defendants appearing concerning the next of kin of said deceased entryman, and upon such examination should any heir be discovered who has not been served or who has not appeared, the court may order such heir brought in if necessary for the determination herein provided for.

**History: En. Sec. 10, Ch. 15, L. 1915; re-en. Sec. 9510, R.C.M. 1921; re-en. Sec. 9510, R.C.M. 1935; R.C.M. 1947, 93-6234.**

**70-28-215. Judgment — nature and effect — recording.** (1) The judgment shall ascertain and determine the heirship of said deceased entryman and all estates, rights, titles, interests, and claims in and to said property and every part thereof, whether the same be legal or equitable, present or future, vested or contingent, or whether the same consists of mortgages or liens of any description and shall be binding and conclusive upon every person who, at the time of the commencement of the action, had or claimed to have any estate, right, title, or interest in or to said property or any part thereof and upon every person claiming under him by title subsequent to the commencement of the action.

(2) A certified copy of the judgment in such action shall be recorded in the office of the clerk and recorder of the county in which said action was commenced, and any party or the successor in interest of any party to said action may at his option file for record in the office of the clerk and recorder of such county the entire judgment roll in said action.

**History: En. Sec. 11, Ch. 15, L. 1915; re-en. Sec. 9511, R.C.M. 1921; re-en. Sec. 9511, R.C.M. 1935; R.C.M. 1947, 93-6235.**

**70-28-216. Subsequent action — notice to original parties required.** Whenever judgment in an action hereby authorized shall have been entered as to any real property, no other action relative to the same property or any part thereof maintained under this part shall be tried until proof shall first have been made to the court that all persons who appeared in the first action or their successors in interest have been personally served with the papers mentioned in 70-28-209, either within or without this state, more than 1 month before the time to plead expired.

**History: En. Sec. 13, Ch. 15, L. 1915; re-en. Sec. 9513, R.C.M. 1921; re-en. Sec. 9513, R.C.M. 1935; R.C.M. 1947, 93-6237.**

# CHAPTER 29

## PARTITION OF REAL PROPERTY

### Part 1 — Preliminary Procedure

Section

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## Part 1

## Preliminary Procedure

**70-29-101. Action for partition authorized — who may bring.** When several cotenants hold and are in possession of real property as joint tenants or tenants in common, in which one or more of them have an estate of inheritance or for life or lives or for years, an action may be brought by one or more of such persons for a partition thereof, according to the respective rights of the persons interested therein, and for a sale of such property or a part thereof if it appears that a partition cannot be made without a great prejudice to the owners.

**History: En. Sec. 492, p. 140, Bannack Stat.; re-en. Sec. 264, p. 190, L. 1867; re-en. Sec. 313, p. 97, Cod. Stat. 1871; re-en. Sec. 364, p. 139, L. 1877; re-en. Sec. 364, 1st Div. Rev. Stat. 1879; re-en. Sec. 377, 1st Div. Comp. Stat. 1887; re-en. Sec. 1340, C. Civ. Proc. 1895; re-en. Sec. 6883, Rev. C. 1907; re-en. Sec. 9516, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 752; re-en. Sec. 9516, R.C.M. 1935; R.C.M. 1947, 93-6301.**

**70-29-102. Action by infant.** (1) An action for the partition of real property shall not be brought by an infant, except by the written authority of the district judge of the county in which the property or a part thereof is situated. The authority shall not be given unless the district judge is satisfied, by affidavit or other competent evidence, that the interests of the infant will be promoted by bringing the action.

(2) A judgment for a partition shall not be rendered in such an action unless the court is satisfied that the interests of the infant will be promoted thereby and that fact is expressly recited in the judgment.

(3) A guardian ad litem for an infant party, in an action for partition, can be appointed only by the court or judge and must give an undertaking in a sum fixed by the judge for the faithful discharge of his trust, which undertaking must be approved by the judge and filed with the clerk.

**History: En. Sec. 1341, C. Civ. Proc. 1895; re-en. Sec. 6884, Rev. C. 1907; re-en. Sec. 9517, R.C.M. 1921; re-en. Sec. 9517, R.C.M. 1935; R.C.M. 1947, 93-6302.**

**70-29-103. Complaint — contents.** The interests of all the persons in the property, whether such persons be known or unknown, must be set forth in the complaint specifically and particularly, as far as known to the plaintiff; and if one or more of the parties or the share or quantity of interest of any of the parties be unknown to the plaintiff or be uncertain or contingent or the ownership of the inheritance depend upon the executory devise or the remainder be a contingent remainder so that such parties cannot be named, that fact must be set forth in the complaint.

**History: En. Sec. 493, p. 140, Bannack Stat.; re-en. Sec. 265, p. 190, L. 1867; re-en. Sec. 314, p. 97, Cod. Stat. 1871; re-en. Sec. 365, p. 139, L. 1877; re-en. Sec. 365, 1st Div. Rev. Stat. 1879; re-en. Sec. 378, 1st Div. Comp. Stat. 1887; re-en. Sec. 1344, C. Civ. Proc. 1895; re-en. Sec. 6887, Rev. C. 1907; re-en. Sec. 9520, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 753; re-en. Sec. 9520, R.C.M. 1935; R.C.M. 1947, 93-6305.**

**70-29-104. Who must be parties — permissible plaintiffs.** (1) The following must be parties to an action for partition:

(a) every person having an undivided share, in possession or otherwise, in the property as tenant in fee, for life, or for years;

(b) every person entitled to the reversion, remainder, or inheritance of an undivided share, after the determination of a particular estate therein;

(c) every person who by any contingency contained in a devise or grant or otherwise is or may become entitled to a beneficial interest in an undivided share thereof;

(d) every person having an inchoate right of dower in an undivided share in the property; and

(e) every person having a right of dower in the property or any part thereof which has not been admeasured.

(2) But no person other than a joint tenant or a tenant in common of the property shall be a plaintiff in the action.

**History: En. Sec. 1342, C. Civ. Proc. 1895; re-en. Sec. 6885, Rev. C. 1907; re-en. Sec. 9518, R.C.M. 1921; re-en. Sec. 9518, R.C.M. 1935; R.C.M. 1947, 93-6303.**

**70-29-105. Who may be joined as defendants.** (1) The plaintiff may, at his election, make a tenant in dower, for life or for years, of the entire property or a creditor or other person having a lien or interest which attaches to the entire property a defendant in the action. In that case the final judgment may either award to such a party his or her entire right and interest or the proceeds thereof or may reserve and leave unaffected his or her right or interest or any portion thereof.

(2) A person specified in this section who is not made a party is not affected by the judgment in the action.

**History: En. Sec. 1343, C. Civ. Proc. 1895; re-en. Sec. 6886, Rev. C. 1907; re-en. Sec. 9519, R.C.M. 1921; re-en. Sec. 9519, R.C.M. 1935; R.C.M. 1947, 93-6304.**

**70-29-106. Unnecessary to join grantees or lienholders not of record.** No person having a conveyance of or claiming a lien on the property or some part of it need be made a party to the action unless such conveyance or lien appear of record.

**History: En. Sec. 266, p. 190, L. 1867; re-en. Sec. 315, p. 97, Cod. Stat. 1871; re-en. Sec. 366, p. 140, L. 1877; re-en. Sec. 366, 1st Div. Rev. Stat. 1879; re-en. Sec. 379, 1st Div. Comp. Stat. 1887; re-en. Sec. 1345, C. Civ. Proc. 1895; re-en. Sec. 6888, Rev. C. 1907; re-en. Sec. 9521, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 754; re-en. Sec. 9521, R.C.M. 1935; R.C.M. 1947, 93-6306.**

**70-29-107. Lienholders of record as parties.** If it appears to the court, by the certificate of the clerk of the court and county clerk and recorder or by the sworn or verified statement of any person who may have examined or searched the records, that there are outstanding liens or encumbrances of record upon such real property or any part or portion thereof which existed and were of record at the time of the commencement of the action, and the persons holding such liens are not made parties to the action, the court must either order such persons to be made parties to the action by an amendment or supplemental complaint or appoint a referee to ascertain whether or not such liens or encumbrances have been paid or, if not paid, what amount remains due thereon and their order among the liens or encumbrances severally held by such persons and the parties to the action and whether the amount remaining due thereon has been secured in any manner and, if secured, the nature and extent of the security.

**History: En. Sec. 501, p. 142, Bannack Stat.; en. Sec. 273, p. 191, L. 1867; re-en. Sec. 322, p. 98, Cod. Stat. 1871; re-en. Sec. 373, p. 142, L. 1877; re-en. Sec. 373, 1st Div. Rev. Stat. 1879; re-en. Sec. 386, 1st Div. Comp. Stat. 1887; re-en. Sec. 1353, C. Civ. Proc. 1895; re-en. Sec. 6896, Rev. C. 1907; re-en. Sec. 9529, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 761; re-en. Sec. 9529, R.C.M. 1935; R.C.M. 1947, 93-6314.**

**70-29-108. Lienholders of record to be notified.** (1) The plaintiff must cause a notice to be served a reasonable time previous to the day for appearance before the referee appointed, as provided in 70-29-107, on each person having outstanding liens of record who is not a party to the action to appear before the referee at a specified time and place to make proof by his own affidavit or otherwise of the amount due or to become due, contingently or absolutely, thereon.

(2) In case such person be absent or his residence be unknown, service may be made by publication or notice to his agents, under the direction of the court, in such manner as may be proper.

(3) The report of the referee thereon must be made to the court and must be confirmed, modified, or set aside and a new reference ordered, as the justice of the case may require.

**History: En. Sec. 502, p. 142, Bannack Stat.; re-en. Sec. 274, p. 192, L. 1867; re-en. Sec. 323, p. 99, Cod. Stat. 1871; re-en. Sec. 374, p. 142, L. 1877; re-en. Sec. 374, 1st Div. Rev. Stat. 1879; re-en. Sec. 387, 1st Div. Comp. Stat. 1887; re-en. Sec. 1354, C. Civ. Proc. 1895; re-en. Sec. 6897, Rev. C. 1907; re-en. Sec. 9530, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 762; re-en. Sec. 9530, R.C.M. 1935; R.C.M. 1947, 93-6315.**

**70-29-109. Notice of action to be filed with clerk — lis pendens.** (1) Immediately after filing the complaint in the district court, the plaintiff must file in the office of the county clerk and recorder of the county or of the several counties in which the property is situated a notice of the pendency of the action containing:

(a) the names of the parties so far as known;

(b) the object of the action; and

(c) a description of the property to be affected thereby.

(2) From the time of filing such notice, all persons shall be deemed to have notice of the pendency of the action.

**History: En. Sec. 495, p. 141, Bannack Stat.; re-en. Sec. 267, p. 190, L. 1867; re-en. Sec. 316, p. 97, Cod. Stat. 1871; re-en. Sec. 367, p. 140, L. 1877; re-en. Sec. 367, 1st Div. Rev. Stat. 1879; re-en. Sec. 380, 1st Div. Comp. Stat. 1887; amd. Sec. 1346, C. Civ. Proc. 1895; re-en. Sec. 6889, Rev. C. 1907; re-en. Sec. 9522, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 755; re-en. Sec. 9522, R.C.M. 1935; R.C.M. 1947, 93-6307.**

**70-29-110. Summons — to whom directed.** The summons must be directed to all the joint tenants and tenants in common and all persons having an interest in or any liens of record by mortgage, judgment, or otherwise upon the property or upon any particular portion thereof and generally to all persons unknown who have or claim any interest in the property.

**History: En. Sec. 496, p. 141, Bannack Stat.; re-en. Sec. 268, p. 190, L. 1867; re-en. Sec. 317, p. 97, Cod. Stat. 1871; re-en. Sec. 368, p. 140, L. 1877; re-en. Sec. 368, 1st Div. Rev. Stat. 1879; re-en. Sec. 381, 1st Div. Comp. Stat. 1887; re-en. Sec. 1347, C. Civ. Proc. 1895; re-en. Sec. 6890, Rev. C. 1907; re-en. Sec. 9523, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 756; re-en. Sec. 9523, R.C.M. 1935; R.C.M. 1947, 93-6308.**

**70-29-111. Unknown and out-of-state parties — how served.** (1) If a party having a share or interest is unknown or any one of the known parties resides out of the state or cannot be found therein and such fact is made to appear by affidavit, the summons may be served on such absent or unknown party by publication, as in other cases.

(2) When publication is made, the summons, as published, must be accompanied by a general statement of the nature of the action and a brief description of the property which is the subject of the action.

**History: En. Sec. 497, p. 141, Bannack Stat.; re-en. Sec. 269, p. 191, L. 1867; re-en. Sec. 318, p. 98, C. Stat. 1871; re-en. Sec. 369, p. 140, L. 1877; re-en. Sec. 369, 1st Div. Rev. Stat. 1879; re-en. Sec. 382, 1st Div. Comp. Stat. 1887; amd. Sec. 1348, C. Civ. Proc. 1895; re-en. Sec. 6891, Rev. C. 1907; re-en. Sec. 9524, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 757; re-en. Sec. 9524, R.C.M. 1935; R.C.M. 1947, 93-6309.**

**70-29-112. Answer — contents.** The defendants who have been personally served with the summons and a copy of the complaint or who have appeared without such service must set forth in their answers, fully and particularly, the origin, nature, and extent of their respective interests in the property, and if such defendants claim a lien on the property by mortgage, judgment, or otherwise, they are deemed to have waived their right to such lien unless they state:

(1) the original amount and date of the same and the sum remaining due thereon;

(2) whether the same has been secured in any other way or not; and

(3) if secured, the nature and extent of such security.

**History: En. Sec. 498, p. 141, Bannack Stat.; amd. Sec. 270, p. 191, L. 1867; re-en. Sec. 319, p. 98, Cod. Stat. 1871; re-en. Sec. 370, p. 141, L. 1877; re-en. Sec. 370, 1st Div. Rev. Stat. 1879; re-en. Sec. 383, 1st Div. Comp. Stat. 1887; amd. Sec. 1349, C. Civ. Proc. 1895; re-en. Sec. 6892, Rev. C. 1907; re-en. Sec. 9525, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 758; re-en. Sec. 9525, R.C.M. 1935; R.C.M. 1947, 93-6310.**

**70-29-113. Death or incompetency of parties — proceedings not delayed.** (1) If during the pendency of the action any of the parties die or become insane or otherwise incompetent, the proceedings shall not for that cause be delayed or suspended, but the attorney who has appeared for such party may continue to represent such interest; and in case any such party has not appeared by an attorney, the court shall appoint an attorney to represent the interest which was held by such party until his heirs or legal representatives or successors in interest shall have appeared in the action.

(2) An attorney so appointed shall be allowed by the court a reasonable compensation for his services, which may be taxed as costs against the share or interest represented by such attorney and may be adjudged a lien thereon, in the discretion of the court.

**History: En. Sec. 1357, C. Civ. Proc. 1895; re-en. Sec. 6900, Rev. C. 1907; re-en. Sec. 9533, R.C.M. 1921; re-en. Sec. 9533, R.C.M. 1935; R.C.M. 1947, 93-6318.**

## Part 2

## Trial and Judgment

**70-29-201. Trial of title or interest of parties.** The right of the several parties, plaintiff as well as defendant, may be put in issue, tried, and determined in such action. The title or interest of the plaintiff in the property, as stated in the complaint, may be controverted by the answer. The title or interest of any defendant in the property, as stated in the complaint, may also be controverted, by his answer or the answer of any other defendant, and the title or interest of any defendant, as stated in his answer, may be controverted by the answer of any other defendant and the issues joined as prescribed in Title 25, which may be tried before a jury if the court so direct.

**History: En. Sec. 499, p. 141, Bannack Stat.; re-en. Sec. 271, p. 191, L. 1867; re-en. Sec. 320, p. 98, Cod. Stat. 1871; re-en. Sec. 371, p. 140, L. 1877; re-en. Sec. 371, 1st Div. Rev. Stat. 1879; re-en. Sec. 384, 1st Div. Comp. Stat. 1887; en. Sec. 1350, C. Civ. Proc. 1895; re-en. Sec. 6893, Rev. C. 1907; re-en. Sec. 9526, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 759; re-en. Sec. 9526, R.C.M. 1935; R.C.M. 1947, 93-6311.**

**70-29-202. Court to order sale or partition — appointment of referees.** (1) If it be alleged in the complaint and established by evidence or if it appear by the evidence without such allegation in the complaint to the satisfaction of the court that the property or any part is so situated that the partition cannot be made without great prejudice to the owners, the court may order a sale thereof; otherwise, upon the requisite proofs being made, it must order a partition according to the respective rights of the parties as ascertained by the court and appoint three referees therefor and must designate the portion to remain undivided for the owners whose interests remain unknown or are not ascertained.

(2) The court, with the consent of the parties, may appoint a single referee instead of three referees in the proceedings under the provisions of this chapter, and the single referee, when thus appointed, has all the powers and may perform all the duties required of the three referees.

**History: (1)En. Sec. 503, p. 142, Bannack Stat.; re-en. Sec. 275, p. 192, L. 1867; re-en. Sec. 324, p. 99, Cod. Stat. 1871; re-en. Sec. 375, p. 142, L. 1877; re-en. Sec. 375, 1st Div. Rev. Stat. 1879; re-en. Sec. 388, 1st Div. Comp. Stat. 1887; re-en. Sec. 1355, C. Civ. Proc. 1895; re-en. Sec. 6898, Rev. C. 1907; re-en. Sec. 9531, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 763; re-en. Sec. 9531, R.C.M. 1935; Sec. 93-6316, R.C.M. 1947; (2)En. Sec. 537, p. 148, Bannack Stat.; re-en. Sec. 309, p. 196, L. 1867; re-en. Sec. 358, p. 104, L. 1871; rep. Sec. 674, p. 215, L. 1877; en. Sec. 1395, C. Civ. Proc. 1895; re-en. Sec. 6938, Rev. C. 1907; re-en. Sec. 9571, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 797; re-en. Sec. 9571, R.C.M. 1935; Sec. 93-6356, R.C.M. 1947; R.C.M. 1947, 93-6316, 93-6356.**

**70-29-203. Determination of title required before judgment of sale.** When a sale of the premises is necessary, the title must be ascertained by proof to the satisfaction of the court before the judgment of sale can be made, and where service of the summons has been made by publication, like proof must be required of the right of the absent or unknown parties before such judgment is rendered, except where there are several unknown parties having an interest in the property, their rights may be considered together in the action and not as between themselves.

**History: En. Sec. 499, p. 141, Bannack Stat.; re-en. Sec. 271, p. 191, L. 1867; re-en. Sec. 320, p. 98, Cod. Stat. 1871; re-en. Sec. 371, p. 140, L. 1877; re-en. Sec. 371, 1st Div. Rev. Stat. 1879; re-en. Sec. 384, 1st Div. Comp. Stat. 1887; en. Sec. 1351, C. Civ. Proc. 1895; re-en. Sec. 6894, Rev. C. 1907; re-en. Sec. 9527, R.C.M. 1921; re-en. Sec. 9527, R.C.M. 1935; R.C.M. 1947, 93-6312.**

**70-29-204. Partial partition.** Whenever from any cause it is in the opinion of the court impracticable or highly inconvenient to make a complete partition in the first instance among all the parties in interest, the court may first ascertain and determine the shares or interests respectively held by the original cotenants and thereupon adjudge and cause a partition to be made as if such original cotenants were the parties and sole parties in interest and the only parties to the action and thereafter may proceed in like manner to adjudge and make partition separately of each share or portion so ascertained and allotted, as between those claiming under the original tenant to whom the same shall have been so set apart, or may allow them to remain tenants in common thereof, as they may desire.

**History: En. Sec. 272, p. 191, L. 1867; re-en. Sec. 321, p. 98, Cod. Stat. 1871; re-en. Sec. 372, p. 141, L. 1877; re-en. Sec. 372, 1st Div. Rev. Stat. 1879; re-en. Sec. 385, 1st Div. Comp. Stat. 1887; re-en. Sec. 1352, C. Civ. Proc. 1895; re-en. Sec. 6895, Rev. C. 1907; re-en. Sec. 9528, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 760; re-en. Sec. 9528, R.C.M. 1935; R.C.M. 1947, 93-6313.**

**70-29-205. Partition according to rights of parties — roads.** (1) In making partition, the referees must divide the property and allot the several portions thereof to the respective parties, quality and quantity relatively considered, according to the respective rights of the parties as determined by the court, pursuant to the provisions of this chapter, designating the several portions by proper landmarks, and may employ a surveyor with the necessary assistants to aid them.

(2) Before making partition or sale, the referees may, whenever it will be for the advantage of those interested, set apart a portion of the property for a way, road, or street, and the portion so set apart shall not be assigned to any of the parties or sold but shall remain an open and public way, road, or street unless the referees shall set the same apart as a private way for the use of the parties interested or some of them, their heirs, and assigns, in which case it shall remain such private way. Whenever the referees have laid out on any tract of land roads sufficient, in the judgment of said referees, to accommodate the public and private wants, they shall report that fact to the court, and upon the confirmation of their report all other roads on said tract shall cease to be public highways.

**History: En. Sec. 504, p. 143, Bannack Stat.; re-en. Sec. 276, p. 192, L. 1867; re-en. Sec. 325, p. 99, Cod. Stat. 1871; re-en. Sec. 376, p. 143, L. 1877; re-en. Sec. 376, 1st Div. Rev. Stat. 1879; re-en. Sec. 389, 1st Div. Comp. Stat. 1887; en. Sec. 1358, C. Civ. Proc. 1895; re-en. Sec. 6901, Rev. C. 1907; re-en. Sec. 9534, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 764; re-en. Sec. 9534, R.C.M. 1935; R.C.M. 1947, 93-6319.**

**70-29-206. Procedure in relation to lots and subdivisions.** When the site of an incorporated city or town is included within the exterior boundaries of the property to be partitioned, on said fact being established by evidence, the following proceedings shall be had:

(1) The court shall thereupon direct the referees to survey and appraise the entire property to be partitioned by actual lots and subdivisions then existing in the actual possession of the several tenants in common, exclusive of the value of improvements thereon, first setting apart necessary portions of the property for ways, roads, and streets, as in 70-29-205 provided, and to report such survey and separate appraisement on each lot and subdivision to the court. The court may confirm, change, modify, or set aside the report in whole or in part and, if necessary, appoint new referees.

(2) When, after the final confirmation of the report of such survey and appraisement, it shall appear by evidence to the satisfaction of the court that an equitable partition of the whole property is impracticable and a sale of the site of such city, town, or any portion thereof will be for the best interest of the owners of the whole property, it shall order a sale thereof; provided that within 60 days thereafter any tenant in common or tenants in common having improvements erected on any town or city lot or subdivision included in such order of sale shall have the prior right to purchase the same at such appraised valuation and pay into court the amount so appraised as the value thereof, and upon such payment, the title shall vest in such purchaser or purchasers, and the court shall cause to be executed by said referees a deed for such lot or subdivision in fee and in severalty to such purchaser or purchasers. Such further proceedings shall then be had as to the

remainder of the property and the money so paid to the court as by this chapter provided.

**History: En. Sec. 1356, C. Civ. Proc. 1895; re-en. Sec. 6899, Rev. C. 1907; re-en. Sec. 9532, R.C.M. 1921; re-en. Sec. 9532, R.C.M. 1935; R.C.M. 1947, 93-6317.**

**70-29-207. Allotment of shares of land — improvements.** In all cases the court shall direct the referees, in making partition of land, to allot the share of each of the parties owning an interest in the whole or in any part of the premises sought to be partitioned and to locate the share of each cotenant so as to embrace as far as practicable the improvements made by such cotenant upon the property, and the value of the improvements made by the tenants in common must be excluded from the valuation in making allotments, and the land must be valued without regard to such improvements, in case the same can be done without material injury to the rights and interests of the other tenants in common owning such land.

**History: En. Sec. 1359, C. Civ. Proc. 1895; re-en. Sec. 6902, Rev. C. 1907; re-en. Sec. 9535, R.C.M. 1921; re-en. Sec. 9535, R.C.M. 1935; R.C.M. 1947, 93-6320(part).**

**70-29-208. Allotment of land to grantee of tenant in common.** Whenever it shall appear in an action for the partition of lands that one or more of the tenants in common, being the owner of an undivided interest in the tract of land sought to be partitioned, has sold to another person a specific tract by metes and bounds out of the common land and executed to the purchaser a deed of conveyance, purporting to convey the whole title to such specific tract to the purchaser in fee and in severalty, the land described in such deed shall be allotted and set apart in partition to such purchaser, his heirs, or assigns or in such other manner as shall make such deed effectual as a conveyance of the whole title to such segregated parcel if such tract or tracts of land can be so allotted or set apart without material injury to the rights and interests of the other cotenants who may not have joined in such conveyance.

**History: En. Sec. 1359, C. Civ. Proc. 1895; re-en. Sec. 6902, Rev. C. 1907; re-en. Sec. 9535, R.C.M. 1921; re-en. Sec. 9535, R.C.M. 1935; R.C.M. 1947, 93-6320(part).**

**70-29-209. Compensation of one party by another in certain cases of partition.** (1) When it appears that a partition cannot be made equal between the parties according to their respective rights without prejudice to the rights and interests of some of them and a partition be ordered, the court may adjudge compensation to be made by one party to another on account of the inequality, but such compensation shall not be required to be made to others by owners unknown or by an infant unless it appears that such infant has personal property sufficient for that purpose and that his interest will be promoted thereby.

(2) In all cases the court has power to make compensatory adjustment between the respective parties according to the ordinary principles of equity.

**History: En. Sec. 532, p. 147, Bannack Stat.; re-en. Sec. 304, p. 196, L. 1867; re-en. Sec. 353, p. 104, Cod. Stat. 1871; rep. Sec. 627, p. 215, L. 1877; en. Sec. 1387, C. Civ. Proc. 1895; re-en. Sec. 6930, Rev. C. 1907; re-en. Sec. 9563, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 792; re-en. Sec. 9563, R.C.M. 1935; R.C.M. 1947, 93-6348.**

**70-29-210. Consent of guardian to share of ward.** The general guardian of an infant and the guardian entitled to the custody and management of the estate of an insane person, or other person adjudged incapable of conducting his own affairs, who is interested in real estate held in joint tenancy or in common or in any other manner so as to authorize his being made a party to an action, may agree upon the share to be set off to such infant or other person entitled and may execute a release, in his behalf, to the owners of the shares of the parts to which they may be respectively entitled, upon an order of the court.

**History: En. Sec. 535, p. 148, Bannack Stat.; re-en. Sec. 307, p. 196, L. 1867; re-en. Sec. 356, p. 104, Cod. Stat. 1871; rep. Sec. 627, p. 215, L. 1877; en. Sec. 1390, C. Civ. Proc. 1895; re-en. Sec. 6933, Rev. C. 1907; re-en. Sec. 9566, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 795; re-en. Sec. 9566, R.C.M. 1935; R.C.M. 1947, 93-6351.**

**70-29-211. Referees to make report.** The referees must make a report of their proceedings, specifying therein the manner in which they executed their trust and describing the property divided and the shares allotted to each party with a particular description of each share.

**History: En. Sec. 505, p. 143, Bannack Stat.; re-en. Sec. 277, p. 192, L. 1867; re-en. Sec. 326, p. 99, Cod. Stat. 1871; re-en. Sec. 377, p. 143, L. 1877; re-en. Sec. 377, 1st Div. Rev. Stat. 1879; re-en. Sec. 390, 1st Div. Comp. Stat. 1887; re-en. Sec. 1360, C. Civ. Proc. 1895; re-en. Sec. 6903, Rev. C. 1907; re-en. Sec. 9536, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 765; re-en. Sec. 9536, R.C.M. 1935; R.C.M. 1947, 93-6321.**

**70-29-212. Judgment upon confirmation of report — effect.** (1) The court may confirm, change, modify, or set aside the report and if necessary appoint new referees.

(2) Upon the report being confirmed, judgment must be rendered that such partition be effectual forever, which judgment is binding and conclusive on all:

(a) persons named as parties to the action and their legal representatives, who have at the time any interest in the property divided or any part thereof, as owners in fee or as tenants for life or for years or as entitled to the reversion, remainder, or the inheritance of such property or any part thereof after the determination of a particular estate therein, and who by any contingency may be entitled to a beneficial interest in the property or who have an interest in any undivided share thereof, as tenants for years or for life;

(b) persons interested in the property, who may be unknown, to whom notice has been given of the action for partition by publication;

(c) other persons claiming from such parties or persons or either of them.

(3) No judgment is invalidated by reason of the death of any party before final judgment or decree, but such judgment or decree is as conclusive against the heirs, legal representatives, or assigns of such decedent as if it had been entered before his death.

**History: En. Sec. 506, p. 143, Bannack Stat.; amd. Sec. 278, p. 192, L. 1867; re-en. Sec. 327, p. 100, Cod. Stat. 1871; amd. Sec. 378, p. 143, L. 1877; re-en. Sec. 378, 1st Div. Rev. Stat. 1879; re-en. Sec. 391, 1st Div. Comp. Stat. 1887; en. Sec. 1361, C. Civ. Proc. 1895; re-en. Sec. 6904, Rev. C. 1907; re-en. Sec. 9537, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 766; re-en. Sec. 9537, R.C.M. 1935; R.C.M. 1947, 93-6322.**

**70-29-213. Judgment not to affect certain tenants for years.** The judgment does not affect tenants for years, less than 10, to the whole of the property which is the subject of the partition.

**History: En. Sec. 507, p. 143, Bannack Stat.; re-en. Sec. 279, p. 193, L. 1867; re-en. Sec. 328, p. 100, Cod. Stat. 1871; re-en. Sec. 379, p. 144, L. 1877; re-en. Sec. 379, 1st Div. Rev. Stat. 1879; re-en. Sec. 392, 1st Div. Comp. Stat. 1887;**

**re-en. Sec. 1362, C. Civ. Proc. 1895; re-en. Sec. 6905, Rev. C. 1907; re-en. Sec. 9538, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 767; re-en. Sec. 9538, R.C.M. 1935; R.C.M. 1947, 93-6323.**

**70-29-214. Status of estate for years when partial sale ordered.** When a part of the property only is ordered to be sold, if there be an estate for life or years in an undivided share of the whole property, such estate may be set off in any part of the property not ordered to be sold.

**History: En. Sec. 510, p. 143, Bannack Stat.; re-en. Sec. 282, p. 193, L. 1867; re-en. Sec. 331, p. 100, Cod. Stat. 1871; re-en. Sec. 382, p. 144, L. 1877; re-en. Sec. 382, 1st Div. Rev. Stat. 1879; re-en. Sec. 395, 1st Div. Comp. Stat. 1887; re-en. Sec. 1365, C. Civ. Proc. 1895; re-en. Sec. 6908, Rev. C. 1907; re-en. Sec. 9541, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 770; re-en. Sec. 9541, R.C.M. 1935; R.C.M. 1947, 93-6326.**

**70-29-215. Lien on undivided interest — status after partition.** When a lien is on an undivided interest or estate of any of the parties, such lien, if a partition be made, shall thenceforth be a charge only on the share assigned to such party, but such share must be first charged with its just proportion of the costs of the partition in preference to such lien.

**History: En. Sec. 509, p. 143, Bannack Stat.; re-en. Sec. 281, p. 193, L. 1867; re-en. Sec. 330, p. 100, Cod. Stat. 1871; re-en. Sec. 381, p. 144, L. 1877; re-en. Sec. 381, 1st Div. Rev. Stat. 1879; re-en. Sec. 394, 1st Div. Comp. Stat. 1887; re-en. Sec. 1364, C. Civ. Proc. 1895; re-en. Sec. 6907, Rev. C. 1907; re-en. Sec. 9540, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 769; re-en. Sec. 9540, R.C.M. 1935; R.C.M. 1947, 93-6325.**

**70-29-216. Abstract of title — when cost of allowed — filing and inspection.** (1) If it appears to the court that it was necessary to have made an abstract of the title to the property to be partitioned and such abstract shall have been procured by the plaintiff or if the plaintiff shall have failed to have the same made before the commencement of the action and any one of the defendants shall have had such abstract afterward made, the cost of the abstract, with interest thereon from the time the same is subject to the inspection of the respective parties to the action, must be allowed and taxed.

(2) Whenever such abstract is procured by the plaintiff, before the commencement of the action he must file with his complaint a notice that an abstract of the title has been made and is subject to the inspection and use of all the parties to the action, designating therein where the abstract will be kept for inspection. But if the plaintiff shall have failed to procure such abstract before commencing the action and any defendant shall procure the same to be made, he shall, as soon as he has directed it to be made, file a notice thereof in the action with the clerk of the court, stating who is making the same and where it will be kept when finished.

(3) The court or judge thereof may direct, from time to time during the progress of the action, who shall have the custody of the abstract.

**History: En. Sec. 1397, C. Civ. Proc. 1895; re-en. Sec. 6940, Rev. C. 1907; re-en. Sec. 9573, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 799; re-en. Sec. 9573, R.C.M. 1935; R.C.M. 1947, 93-6358.**

**70-29-217. Abstract — how made and verified.** The abstract mentioned in 70-29-216 may be made by any competent searcher of records and need not be certified by the county clerk and recorder or other officer, but instead thereof it must be verified by the affidavit of the person making it to the effect that he believes it to be correct; but the same may be corrected from time to time, if found incorrect, under the direction of the court.

**History: En. Sec. 1398, C. Civ. Proc. 1895; re-en. Sec. 6941, Rev. C. 1907; re-en. Sec. 9574, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 800; re-en. Sec. 9574, R.C.M. 1935; R.C.M. 1947, 93-6359.**

**70-29-218. Costs of partition — apportionment among parties — lien.** The costs of partition, including reasonable counsel fees, expended by the plaintiff or either of the defendants for the common benefit, fees of referees, or other disbursements must be paid by the parties respectively entitled to share in the lands divided, in proportion to their respective interests therein, and may be included and specified in the judgment. In that case, they shall be a lien on the several shares and the judgment may be enforced by execution against such shares and against other property held by the respective parties. When, however, litigation arises between some of the parties only, the court may require the expense of such litigation to be paid by the parties thereto or any of them.

**History: En. Sec. 536, p. 148, Bannack Stat.; re-en. Sec. 308, p. 196, L. 1867; re-en. Sec. 357, p. 104, L. 1871; rep. Sec. 674, p. 215, L. 1877; en. Sec. 1394, C. Civ. Proc. 1895; re-en. Sec. 6937, Rev. C. 1907; re-en. Sec. 9570, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 796; re-en. Sec. 9570, R.C.M. 1935; R.C.M. 1947, 93-6355.**

**70-29-219. Expenses of referees and surveyor.** The expenses of the referees, including those of a surveyor and his assistants, when employed, must be ascertained and allowed by the court, and the amount thereof, together with the fees allowed by the court in its discretion to the referees, must be apportioned among the different parties to the action equitably.

**History: En. Sec. 508, p. 143, Bannack Stat.; re-en. Sec. 280, p. 193, L. 1867; re-en. Sec. 329, p. 100, Cod. Stat. 1871; re-en. Sec. 380, p. 144, L. 1877; re-en. Sec. 380, 1st Div. Rev. Stat. 1879; re-en. Sec. 393, 1st Div. Comp. Stat. 1887; re-en. Sec. 1363, C. Civ. Proc. 1895; re-en. Sec. 6906, Rev. C. 1907; re-en. Sec. 9539, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 768; re-en. Sec. 9539, R.C.M. 1935; R.C.M. 1947, 93-6324.**

**70-29-220. Disbursements by party — interest allowed.** Whenever during the progress of the action for partition any disbursements shall have been made under the direction of the court or the judge thereof by a party thereto, interest must be allowed thereon from the time of making such disbursements.

**History: En. Sec. 1399, C. Civ. Proc. 1895; re-en. Sec. 6942, Rev. C. 1907; re-en. Sec. 9575, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 801; re-en. Sec. 9575, R.C.M. 1935; R.C.M. 1947, 93-6360.**

**70-29-221. Expenses of previous litigation.** If it appear that other actions or proceedings have been necessarily prosecuted or defended by any one of the tenants in common for the protection, confirmation, or perfecting of the title or setting the boundaries or making a survey or surveys of the estate partitioned, the court shall allow to the parties to the action who have paid the expense of such litigation or other proceedings all the expenses necessarily incurred therein, except counsel fees, which shall have accrued to the common benefit of the other tenants in common, with interest thereon from the date of making the expenditures, and the same must be pleaded and allowed by the court and included in the final judgment and shall be a lien upon the share of each tenant, respectively, in proportion to his interest and shall be enforced in the same manner as taxable costs of partition are taxed and collected.

**History: En. Sec. 1396, C. Civ. Proc. 1895; re-en. Sec. 6939, Rev. C. 1907; re-en. Sec. 9572, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 798; re-en. Sec. 9572, R.C.M. 1935; R.C.M. 1947, 93-6357.**

## Part 3

## Sale and Disposition of Proceeds

**70-29-301. Sale to be at public auction — notice.** All sales of real property made by referees under this chapter must be made at public auction to the highest bidder, upon notice published in the manner required for the sale of real property on execution. The notice must state the terms of sale, and if the property or any part of it is to be sold subject to a prior estate, charge, or lien, that must be stated in the notice.

**History: En. Sec. 515, p. 145, Bannack Stat.; re-en. Sec. 287, p. 194, L. 1867; re-en. Sec. 336, p. 101, Cod. Stat. 1871; re-en. Sec. 387, p. 146, L. 1877; re-en. Sec. 387, 1st Div. Rev. Stat. 1879; re-en. Sec. 400, 1st Div. Comp. Stat. 1887; re-en. Sec. 1370, C. Civ. Proc. 1895; re-en. Sec. 6913, Rev. C. 1907; re-en. Sec. 9546, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 775; re-en. Sec. 9546, R.C.M. 1935; R.C.M. 1947, 93-6331.**

**70-29-302. Terms of sale to be made known.** In all cases of sales of property, the terms must be made known at the time; and if the premises consist of distinct farms and lots, they must be sold separately.

**History: En. Sec. 522, p. 146, Bannack Stat.; re-en. Sec. 294, p. 195, L. 1867; re-en. Sec. 343, p. 102, Cod. Stat. 1871; re-en. Sec. 394, p. 147, L. 1877; re-en. Sec. 394, 1st Div. Rev. Stat. 1879; re-en. Sec. 407, 1st Div. Comp. Stat. 1887; re-en. Sec. 1377, C. Civ. Proc. 1895; re-en. Sec. 6920, Rev. C. 1907; re-en. Sec. 9553, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 782; re-en. Sec. 9553, R.C.M. 1935; R.C.M. 1947, 93-6338.**

**70-29-303. Who may not be purchasers.** (1) Neither of the referees nor any person for the benefit of either of them can be interested in any purchase, nor can a guardian of an infant party be interested in the purchase of any real property being the subject of the action except for the benefit of the infant.

(2) All sales contrary to the provisions of this section are void.

**History: En. Sec. 523, p. 146, Bannack Stat.; re-en. Sec. 295, p. 195, L. 1867; re-en. Sec. 344, p. 102, Cod. Stat. 1871; re-en. Sec. 395, p. 147, L. 1877; re-en. Sec. 395, 1st Div. Rev. Stat. 1879; re-en. Sec. 408, 1st Div. Comp. Stat. 1887; re-en. Sec. 1378, C. Civ. Proc. 1895; re-en. Sec. 6921, Rev. C. 1907; re-en. Sec. 9554, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 783; re-en. Sec. 9554, R.C.M. 1935; R.C.M. 1947, 93-6339.**

**70-29-304. Party or encumbrancer as purchaser.** When a party entitled to a share of the property or an encumbrancer entitled to have his lien paid out of the sale becomes a purchaser, the referees may take his receipt for so much of the proceeds of the sale as belongs to him.

**History: En. Sec. 526, p. 146, Bannack Stat.; re-en. Sec. 298, p. 195, L. 1867; re-en. Sec. 347, p. 103, Cod. Stat. 1871; rep. Sec. 627, p. 215, L. 1877; en. Sec. 1381, C. Civ. Proc. 1895; re-en. Sec. 6924, Rev. C. 1907; re-en. Sec. 9557, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 786; re-en. Sec. 9557, R.C.M. 1935; R.C.M. 1947, 93-6342.**

**70-29-305. Court to direct terms of credit and investment.** The court must, in the order of sale, direct the terms of credit which may be allowed for the purchase money of any portion of the premises of which it may direct a sale on credit and for that portion of which the purchase money is required by the provisions herein contained to be invested for the benefit of unknown owners, infants, or parties out of this state.

**History: En. Sec. 516, p. 145, Bannack Stat.; re-en. Sec. 288, p. 194, L. 1867; re-en. Sec. 337, p. 101, Cod. Stat. 1871; re-en. Sec. 388, p. 146, L. 1877; re-en. Sec. 388, 1st Div. Rev. Stat. 1879; re-en. Sec. 401, 1st Div. Comp. Stat. 1887; re-en. Sec. 1371, C. Civ. Proc. 1895; re-en. Sec. 6914, Rev. C. 1907; re-en. Sec. 9547, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 776; re-en. Sec. 9547, R.C.M. 1935; R.C.M. 1947, 93-6332.**

**70-29-306. Security for sales on credit.** The referees may take separate mortgages and other securities for the whole or convenient portions of the purchase money of such parts of the property as are directed by the court to be sold on credit for the:

(1) shares of any known owner of full age, in the name of such owner;
(2) shares of an infant, in the name of the guardian of such infant; and
(3) other shares, in the name of the clerk of the court of the county and his successors in office.

**History: En. Sec. 517, p. 145, Bannack Stat.; re-en. Sec. 289, p. 194, L. 1867; re-en. Sec. 338, p. 101, Cod. Stat. 1871; re-en. Sec. 389, p. 146, L. 1877; re-en. Sec. 389, 1st Div. Rev. Stat. 1879; re-en. Sec. 402, 1st Div. Comp. Stat. 1887; re-en. Sec. 1372, C. Civ. Proc. 1895; re-en. Sec. 6915, Rev. C. 1907; re-en. Sec. 9548, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 777; re-en. Sec. 9548, R.C.M. 1935; R.C.M. 1947, 93-6333.**

**70-29-307. Security taken and investment made in name of clerk.** When the security of the proceeds of sale is taken or when an investment of any such proceeds is made, it must be done, except as herein otherwise provided, in the name of the clerk of the court where the papers are filed and his successors in office, who must hold the same for the use and benefit of the persons interested, subject to the order of the court.

**History: En. Sec. 529, p. 147, Bannack Stat.; re-en. Sec. 301, p. 195, L. 1867; re-en. Sec. 350, p. 103, Cod. Stat. 1871; rep. Sec. 627, p. 215, L. 1877; en. Sec. 1384, C. Civ. Proc. 1895; re-en. Sec. 6927, Rev. C. 1907; re-en. Sec. 9560, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 789; re-en. Sec. 9560, R.C.M. 1935; R.C.M. 1947, 93-6345.**

**70-29-308. Agreement of parties as to security.** When security is taken by the referees on a sale and the parties interested in such security, by an instrument in writing under their hands delivered to the referees, agree upon the shares and proportions to which they are respectively entitled or when shares and proportions have been previously adjudged by the court, such securities must be taken in the names of and payable to the parties respectively entitled thereto and must be delivered to such parties upon their receipt therefor. Such agreement and receipt must be returned and filed with the clerk of the court.

**History: En. Sec. 530, p. 147, Bannack Stat.; re-en. Sec. 302, p. 196, L. 1867; re-en. Sec. 351, p. 104, Cod. Stat. 1871; rep. Sec. 627, p. 215, L. 1877; en. Sec. 1385, C. Civ. Proc. 1895; re-en. Sec. 6928, Rev. C. 1907; re-en. Sec. 9561, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 790; re-en. Sec. 9561, R.C.M. 1935; R.C.M. 1947, 93-6346.**

**70-29-309. Referees' report of sale.** (1) After completing a sale of the property or any part thereof ordered to be sold, the referees must report the same to the court with:

(a) a description of the different parcels of land sold to each purchaser;
(b) the price paid or secured;

(c) the terms and conditions of the sale; and
(d) the securities, if any, taken.

(2) The report must be filed in the office of the clerk of the court and a certified copy thereof in the office of the county clerk and recorder of the county where the property is situated.

**History: En. Sec. 524, p. 146, Bannack Stat.; re-en. Sec. 296, p. 195, L. 1867; re-en. Sec. 345, p. 102, Cod. Stat. 1871; re-en. Sec. 396, p. 147, L. 1877; re-en. Sec. 396, 1st Div. Rev. Stat. 1879; re-en. Sec. 409, 1st Div. Comp. Stat. 1887; re-en. Sec. 1379, C. Civ. Proc. 1895; re-en. Sec. 6922, Rev. C. 1907; re-en. Sec. 9555, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 784; re-en. Sec. 9555, R.C.M. 1935; R.C.M. 1947, 93-6340.**

**70-29-310. Execution of conveyances and taking of security.** If the sale be confirmed by the court, an order must be entered directing the referees to execute conveyances and take securities pursuant to such sale which they are hereby authorized to do. Such order may also give directions to them respecting the disposition of the proceeds of sale.

**History: En. Sec. 525, p. 146, Bannack Stat.; re-en. Sec. 297, p. 195, L. 1867; re-en. Sec. 346, p. 103, Cod. Stat. 1871; rep. Sec. 627, p. 215, L. 1877; en. Sec. 1380, C. Civ. Proc. 1895; re-en. Sec. 6923, Rev. C. 1907; re-en. Sec. 9556, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 785; re-en. Sec. 9556, R.C.M. 1935; R.C.M. 1947, 93-6341.**

**70-29-311. Conveyances to be recorded — bar against parties.** The conveyances must be recorded in the county where the premises are situated and shall be a bar against all persons interested in the property in any way who shall have been named as parties in the action and against all such parties and persons as were unknown, if the summons was served by publication, and against all persons claiming under them or either of them and against all persons having unrecorded deeds or liens at the commencement of the action.

**History: En. Sec. 527, p. 146, Bannack Stat.; re-en. Sec. 299, p. 195, L. 1867; re-en. Sec. 348, p. 103, Cod. Stat. 1871; rep. Sec. 627, p. 215, L. 1877; en. Sec. 1382, C. Civ. Proc. 1895; re-en. Sec. 6925, Rev. C. 1907; re-en. Sec. 9558, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 787; re-en. Sec. 9558, R.C.M. 1935; R.C.M. 1947, 93-6343.**

**70-29-312 through 70-29-320 reserved.**

**70-29-321. Priorities for application of proceeds.** The proceeds of the sale of encumbered property must be applied under the direction of the court as follows:

(1) to pay its just proportion of the general costs of the action;
(2) to pay the costs of the reference;
(3) to satisfy and cancel of record the several liens in their order of priority by payment of the sums due and to become due, the amount due to be verified by affidavit at the time of payment;
(4) the residue among the owners of the property sold, according to their respective shares therein.

**History: En. Sec. 511, p. 144, Bannack Stat.; re-en. Sec. 283, p. 193, L. 1867; re-en. Sec. 332, p. 100, Cod. Stat. 1871; re-en. Sec. 383, p. 145, L. 1877; re-en. Sec. 383, 1st Div. Rev. Stat. 1879; re-en. Sec. 396, 1st Div. Comp. Stat. 1887; re-en. Sec. 1366, C. Civ. Proc. 1895; re-en. Sec. 6909, Rev. C. 1907; re-en. Sec. 9542, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 771; re-en. Sec. 9542, R.C.M. 1935; R.C.M. 1947, 93-6327.**

**70-29-322. Other securities to be exhausted first.** Whenever any party to an action who holds a lien upon the property or any part thereof has other securities for the payment of the amount of such lien, the court may, in its discretion, order such securities to be exhausted before a distribution of the proceeds of sale or may order a just deduction to be made from the amount of the lien on the property on account thereof.

**History: En. Sec. 512, p. 144, Bannack Stat.; re-en. Sec. 284, p. 193, L. 1867; re-en. Sec. 333, p. 100, Cod. Stat. 1871; re-en. Sec. 384, p. 145, L. 1877; re-en. Sec. 384, 1st Div. Rev. Stat. 1879; re-en. Sec. 397, 1st Div. Comp. Stat. 1887; re-en. Sec. 1367, C. Civ. Proc. 1895; re-en. Sec. 6910, Rev. C. 1907; re-en. Sec. 9543, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 772; re-en. Sec. 9543, R.C.M. 1935; R.C.M. 1947, 93-6328.**

**70-29-323. Disposition of proceeds generally.** The proceeds of sale and the securities taken by the referees or any part thereof must be distributed by them to the persons entitled thereto whenever the court so directs. But in case no direction be given, all of such proceeds and securities must be paid into the court or deposited therein or as directed by the court.

**History: En. Sec. 513, p. 144, Bannack Stat.; re-en. Sec. 285, p. 194, L. 1867; re-en. Sec. 334, p. 101, Cod. Stat. 1871; re-en. Sec. 385, p. 145, L. 1877; re-en. Sec. 385, 1st Div. Rev. Stat. 1879; re-en. Sec. 398, 1st Div. Comp. Stat. 1887; re-en. Sec. 1368, C. Civ. Proc. 1895; re-en. Sec. 6911, Rev. C. 1907; re-en. Sec. 9544, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 773; re-en. Sec. 9544, R.C.M. 1935; R.C.M. 1947, 93-6329.**

**70-29-324. Continuation of action when proceeds paid into court.** When the proceeds of the sale of any share or parcel belonging to persons who are parties to the action and who are known are paid into the court, the action may continue as between such parties for the determination of their respective claims thereto which must be ascertained and adjudged by the court. Further testimony may be taken in court or by a referee, at the discretion of the court, and the court may, if necessary, require such parties to present the facts or law in controversy by pleadings, as in an original action.

**History: En. Sec. 514, p. 144, Bannack Stat.; re-en. Sec. 286, p. 194, L. 1867; re-en. Sec. 335, p. 101, Cod. Stat. 1871; re-en. Sec. 386, p. 145, L. 1877; re-en. Sec. 386, 1st Div. Rev. Stat. 1879; re-en. Sec. 399, 1st Div. Comp. Stat. 1887; re-en. Sec. 1369, C. Civ. Proc. 1895; re-en. Sec. 6912, Rev. C. 1907; re-en. Sec. 9545, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 774; re-en. Sec. 9545, R.C.M. 1935; R.C.M. 1947, 93-6330.**

**70-29-325. Future interests — ascertainment — share of proceeds.** In all cases of sales when it appears that any person has a vested or contingent or future right or estate in any of the property sold, the court must ascertain and settle the proportional value of such contingent or vested right or estate and must direct such proportion of the proceeds of the sale to be invested, secured, or paid over, in such manner as to protect the rights and interests of the parties.

**History: En. Sec. 521, p. 146, Bannack Stat.; re-en. Sec. 293, p. 195, L. 1867; re-en. Sec. 342, p. 102, Cod. Stat. 1871; re-en. Sec. 393, p. 147, L. 1877; re-en. Sec. 393, 1st Div. Rev. Stat. 1879; re-en. Sec. 406, 1st Div. Comp. Stat. 1887; re-en. Sec. 1376, C. Civ. Proc. 1895; re-en. Sec. 6919, Rev. C. 1907; re-en. Sec. 9552, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 781; re-en. Sec. 9552, R.C.M. 1935; R.C.M. 1947, 93-6337.**

**70-29-326. Tenant for life or years — compensation upon sale.** (1) The person entitled to a tenancy for life or years or who has a right or inchoate right of dower, whose estate has been sold, is entitled to receive such sum as may be deemed a reasonable satisfaction for such estate and which the person so entitled may consent to accept instead thereof by an instrument in writing filed with the clerk of the court. Upon the filing of such consent, the clerk must enter the same in the minutes of the court.

(2) If such consent be not given, filed, and entered, as provided in subsection (1), at or before a judgment of sale is rendered, the court must ascertain and determine what proportion of the proceeds of the sale, after deducting expenses, will be a just and reasonable sum to be allowed on account of such estate and must order the same to be paid to such party or deposited in court for him or her, as the case may require.

(3) If the persons entitled to such estate for life or years be unknown, the court must provide for the protection of their rights in the same manner, as far as may be, as if they were known and had appeared.

**History: (1)En. Sec. 518, p. 145, Bannack Stat.; re-en. Sec. 290, p. 194, L. 1867; re-en. Sec. 339, p. 101, Cod. Stat. 1871; re-en. Sec. 390, p. 146, L. 1877; re-en. Sec. 390, 1st Div. Rev. Stat. 1879; re-en. Sec. 403, 1st Div. Comp. Stat. 1887; re-en. Sec. 1373, C. Civ. Proc. 1895; re-en. Sec. 6916, Rev. C. 1907; re-en. Sec. 9549, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 778; re-en. Sec. 9549, R.C.M. 1935; Sec. 93-6334, R.C.M. 1947; (2)En. Sec. 519, p. 145, Bannack Stat.; re-en. Sec. 291, p. 195, L. 1867; re-en. Sec. 340, p. 102, Cod. Stat. 1871; re-en. Sec. 391, p. 146, L. 1877; re-en. Sec. 391, 1st Div. Rev. Stat. 1879; re-en. Sec. 404, 1st Div. Comp. Stat. 1887; re-en. Sec. 1374, C. Civ. Proc. 1895; re-en. Sec. 6917, Rev. C. 1907; re-en. Sec. 9550, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 779; re-en. Sec. 9550, R.C.M. 1935; Sec. 93-6335, R.C.M. 1947; (3)En. Sec. 520, p. 146, Bannack Stat.; re-en. Sec. 292, p. 195, L. 1867; re-en. Sec. 341, p. 102, Cod. Stat. 1871; re-en. Sec. 392, p. 147, L. 1877; re-en. Sec. 392, 1st Div. Rev. Stat. 1879; re-en. Sec. 405, 1st Div. Comp. Stat. 1887; re-en. Sec. 1375, C. Civ. Proc. 1895; re-en. Sec. 6918, Rev. C. 1907; re-en. Sec. 9551, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 780; re-en. Sec. 9551, R.C.M. 1935; Sec. 93-6336, R.C.M. 1947; R.C.M. 1947, 93-6334, 93-6335, 93-6336.**

**70-29-327. Infant's share of proceeds — payment to guardian.** When the share of an infant is sold, the proceeds of the sale may be paid by the referee making the sale to his general guardian or the special guardian appointed for him in the action upon giving the security required by law or directed by order of the court.

**History: En. Sec. 533, p. 148, Bannack Stat.; re-en. Sec. 305, p. 196, L. 1867; re-en. Sec. 354, p. 104, Cod. Stat. 1871; rep. Sec. 627, p. 215, L. 1877; en. Sec. 1388, C. Civ. Proc. 1895; re-en. Sec. 6931, Rev. C. 1907; re-en. Sec. 9564, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 793; re-en. Sec. 9564, R.C.M. 1935; R.C.M. 1947, 93-6349.**

**70-29-328. Incompetent's share of proceeds — payment to guardian.** The guardian who may be entitled to the custody and management of the estate of an insane person or other person adjudged incapable of conducting his own affairs, whose interest in real property has been sold, may receive in behalf of such person his share of the proceeds of such real property from the referees on executing with sufficient sureties an undertaking, approved by a judge of the court, that he will faithfully discharge the trust reposed in him and will render a true and just account to the person entitled or to his legal representative.

**History: En. Sec. 534, p. 148, Bannack Stat.; re-en. Sec. 306, p. 196, L. 1867; re-en. Sec. 355, p. 104, Cod. Stat. 1871; rep. Sec. 627, p. 215, L. 1877; en. Sec. 1389, C. Civ. Proc. 1895; re-en. Sec. 6932, Rev. C. 1907; re-en. Sec. 9565, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 794; re-en. Sec. 9565, R.C.M. 1935; R.C.M. 1947, 93-6350.**

**70-29-329. Proceeds of sale belonging to persons unknown or out-of-state — how invested.** Where there are proceeds of a sale belonging to an unknown owner or to a person without the state who has no legal representative within it, the same must be invested in bonds of this state or the United States for the benefit of the persons entitled thereto.

**History: En. Sec. 528, p. 146, Bannack Stat.; re-en. Sec. 300, p. 195, L. 1867; re-en. Sec. 349, p. 103, Cod. Stat. 1871; rep. Sec. 627, p. 215, L. 1877; en. Sec. 1383, C. Civ. Proc. 1895; re-en. Sec. 6926, Rev. C. 1907; re-en. Sec. 9559, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 788; re-en. Sec. 9559, R.C.M. 1935; R.C.M. 1947, 93-6344.**

**70-29-330. Duty of clerk as to security and investments.** The clerk of court in whose name a security is taken or by whom an investment is made and his successors in office must:

(1) receive the interest and principal as it becomes due and apply and invest the same as the court may direct;

(2) deposit with the county treasurer all securities taken; and

(3) keep an account of investments and moneys received by him thereon and the disposition thereof in a book provided and kept for that purpose in the clerk's office, free for inspection by all persons.

**History: En. Sec. 531, p. 147, Bannack Stat.; re-en. Sec. 303, p. 196, L. 1867; re-en. Sec. 352, p. 104, Cod. Stat. 1871; rep. Sec. 627, p. 215, L. 1877; en. Sec. 1386, C. Civ. Proc. 1895; re-en. Sec. 6929, Rev. C. 1907; re-en. Sec. 9562, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 791; re-en. Sec. 9562, R.C.M. 1935; R.C.M. 1947, 93-6347.**

# CHAPTER 30

# EMINENT DOMAIN

### Part 1 — General and Substantive Provisions

Section
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## Part 1

## General and Substantive Provisions

**70-30-101. Eminent domain defined.** Eminent domain is the right of the state to take private property for public use. This right may be exercised in the manner provided in this chapter.

**History: En. Sec. 579, p. 189, L. 1877; re-en. Sec. 579, 1st Div. Rev. Stat. 1879; re-en. Sec. 597, 1st Div. Comp. Stat. 1887; amd. Sec. 2210, C. Civ. Proc. 1895; re-en. Sec. 7330, Rev. C. 1907; re-en. Sec. 9933, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1237; re-en. Sec. 9933, R.C.M. 1935; R.C.M. 1947, 93-9901.**

**70-30-102. Public uses enumerated.** Subject to the provisions of this chapter, the right of eminent domain may be exercised in behalf of the following public uses:

(1) all public uses authorized by the government of the United States;

(2) public buildings and grounds for the use of the state and all other public uses authorized by the legislature of the state;

(3) public buildings and grounds for the use of any county, city or town, or school district; canals, aqueducts, flumes, ditches, or pipes conducting water, heat, or gas for the use of the inhabitants of any county, city, or town; raising the banks of streams, removing obstructions therefrom, and widening, deepening, or straightening their channels; roads, streets, and alleys and all other public uses for the benefit of any county, city, or town or the inhabitants thereof, which may be authorized by the legislature; but the mode of apportioning and collecting the costs of such improvements shall be such as may be provided in the statutes or ordinances by which the same may be authorized;

(4) wharves, docks, piers, chutes, booms, ferries, bridges, of all kinds, private roads, plank and turnpike roads, railroads, canals, ditches, flumes, aqueducts, and pipes for public transportation, supplying mines, mills, and smelters for the reduction of ores and farming neighborhoods with water and drainage and reclaiming lands and for floating logs and lumber on streams not navigable and sites for reservoirs necessary for collecting and storing water. However, such reservoir sites must possess a public use demonstrable to the district court as the highest and best use of the land.

(5) roads, tunnels, ditches, flumes, pipes, and dumping places for working mines, mills, or smelters for the reduction of ores; also outlets, natural or otherwise, for the flow, deposit, or conduct of tailings or refuse matter from mines, mills, and

smelters for the reduction of ores; also an occupancy in common by the owners or the possessors of different mines of any place for the flow, deposit, or conduct of tailings or refuse matter from their several mines, mills, or smelters for reduction of ores and sites for reservoirs necessary for collecting and storing water. However, such reservoir sites must possess a public use demonstrable to the district court as the highest and best use of the land.

(6) private roads leading from highways to residences or farms;

(7) telephone or electric light lines;

(8) telegraph lines;

(9) sewerage of any city, county, or town or any subdivision thereof, whether incorporated or unincorporated, or of any settlement consisting of not less than 10 families or of any public buildings belonging to the state or to any college or university;

(10) tramway lines;

(11) electric power lines;

(12) logging railways;

(13) temporary logging roads and banking grounds for the transportation of logs and timber products to public streams, lakes, mills, railroads, or highways for such time as the court or judge may determine; provided, the grounds of state institutions be excepted;

(14) underground reservoirs suitable for storage of natural gas;

(15) to mine and extract ores, metals, or minerals owned by the plaintiff located beneath or upon the surface of property where the title to said surface vests in others. However, the use of the surface for strip mining or open pit mining of coal (i.e., any mining method or process in which the strata or overburden is removed or displaced in order to extract the coal) is not a public use, and eminent domain may not be exercised for this purpose.

**History: En. Sec. 580, p. 189, L. 1877; re-en. Sec. 580, 1st Div. Rev. Stat. 1879; re-en. Sec. 598, 1st Div. Comp. Stat. 1887; amd. Sec. 2211, C. Civ. Proc. 1895; amd. Sec. 1, p. 135, L. 1899; amd. Sec. 1, Ch. 4, L. 1907; Sec. 7331, Rev. C. 1907; re-en. Sec. 9934, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1238; re-en. Sec. 9934, R.C.M. 1935; amd. Sec. 1, Ch. 245, L. 1953; amd. Sec. 6, Ch. 259, L. 1955; amd. Sec. 1, Ch. 216, L. 1961; amd. Sec. 1, Ch. 311, L. 1973; amd. Sec. 1, Ch. 375, L. 1974; R.C.M. 1947, 93-9902.**

**70-30-103. What private property may be taken.** (1) The private property which may be taken under this chapter includes:

(a) all real property belonging to any person;

(b) lands belonging to this state or to any county, city, or town not appropriated to some public use;

(c) property appropriated to public use, but such property must not be taken unless for a more necessary public use than that to which it has already been appropriated;

(d) franchises for roads, bridges, and ferries and all other franchises; but such franchises must not be taken unless for free highways, free bridges, railroads, or other more necessary public use;

(e) all rights-of-way for any and all the purposes mentioned in 70-30-102 and any and all structures and improvements thereon, and the lands held and used in connection therewith must be subject to be connected with, crossed, or intersected by any other right-of-way of improvements or structures thereon. They must also be subject to a limited use in common with the owner thereof when necessary; but such uses, crossings, intersections, and connections must be made in manner most compatible with the greatest public benefit and least private injury.

(2) All classes of private property not enumerated may be taken for public use when such taking is authorized by law.

**History: En. Sec. 582, p. 190, L. 1877; re-en. Sec. 582, 1st Div. Rev. Stat. 1879; re-en. Sec. 600, 1st Div. Comp. Stat. 1887; amd. Sec. 2213, C. Civ. Proc. 1895;**

**re-en. Sec. 7333, Rev. C. 1907; re-en. Sec. 9936, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1240; re-en. Sec. 9936, R.C.M. 1935; R.C.M. 1947, 93-9904.**

**70-30-104. What estates and rights in land may be taken.** The following is a classification of the estates and rights in lands subject to be taken for the public use:

(1) such estate or rights as may be necessary up to and including a fee simple when taken for public buildings or grounds or for permanent buildings, for reservoirs or dams and permanent flooding occasioned thereby, or for an outlet for a flow or a place for the deposit of debris or tailings of a mine or for the mining and extracting of ores, metals, or minerals when the same are owned by the plaintiff but located beneath or upon the surface of property where the title to said surface vests in others or for the underground storage of natural gas by a natural gas public utility as defined in 82-10-301. When the appropriation is for the underground storage of natural gas, all of the right, title, interest, and estate in the real property and in the subsand stratum, formation, or reservoir so appropriated shall be determinable and for all purposes terminate upon abandonment or upon cessation for the period of 1 year of the use for which the same was appropriated, and thereupon the ownership of the residue of natural gas therein remaining shall likewise vest in the then owners of such reservoir space.

(2) an easement when taken for any other use;

(3) the right of entry upon and occupation of land and the right to take therefrom such earth, gravel, stones, trees, and timber as may be necessary for some public use.

**History: En. Sec. 581, p. 190, L. 1877; re-en. Sec. 581, 1st Div. Rev. Stat. 1879; re-en. Sec. 599, 1st Div. Comp. Stat. 1887; re-en. Sec. 2212, C. Civ. Proc. 1895; re-en. Sec. 7332, Rev. C. 1907; re-en. Sec. 9935, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1239; re-en. Sec. 9935, R.C.M. 1935; amd. Sec. 1, Ch. 158, L. 1943; amd. Sec. 2, Ch. 245, L. 1953; amd. Sec. 7, Ch. 259, L. 1955; amd. Sec. 2, Ch. 216, L. 1961; R.C.M. 1947, 93-9903.**

**70-30-105. Appropriation of underground gas reservoir — effect on owner's right to drill.** (1) The appropriation of any sand, stratum, or formation for use as an underground natural gas storage reservoir shall be without prejudice to the rights of the owner or owners of said lands or of the oil, gas, or other mineral rights therein to drill or bore through the sand, stratum, or formation so appropriated for use as an underground natural gas storage reservoir in order to explore for, produce, process, treat, or market any oil, gas, or other minerals that might be contained in said lands above or below the sand, stratum, or formation so appropriated.

(2) Any additional cost or expense required to be incurred in order to protect the underground gas storage reservoir against pollution and the escape of the gas therefrom by reason of such boring or drilling through of the sand, stratum, or formation used as such underground gas storage reservoir shall be paid by the persons, firm, or corporation then owning such underground gas storage reservoir.

**History: En. Sec. 5, Ch. 245, L. 1953; R.C.M. 1947, 93-9903.1.**

**70-30-106. Eminent domain not to be used for coal mining in certain cases — policy.** For the following reasons the state's power of eminent domain may not be exercised to mine and extract coal owned by the plaintiff located beneath the surface of property where the title to the surface is vested in others:

(1) Because of the large reserves of and the renewed interest in coal in eastern Montana, coal development is potentially more destructive to land and watercourses and underground aquifers and potentially more extensive geographically than the forseeable development of other ores, metals, or minerals and affects large areas of land and large numbers of people.

(2) In many areas of Montana set forth in (1) hereinabove, the title to the surface is vested in an owner other than the mineral owner, and the surface owner is putting that surface to a productive use, and it is the public policy of the state to encourage and foster such productive use by such owner, and to permit the mineral owner to condemn the surface owner is to deprive the surface owner of the right to use his property in a productive manner as he determines and is also contrary to public policy as set forth in subsection (4).

(3) The magnitude of the potential coal development in eastern Montana will subject landowners to undue harassment by excessive use of eminent domain.

(4) It is the public policy of the state to encourage and foster diversity of land ownership, and the surface mining of coal and control of large areas of land by the surface coal mining industry would not foster public policy and further the public interest.

**History: En. 93-9902.1 by Sec. 2, Ch. 311, L. 1973; R.C.M. 1947, 93-9902.1.**

**70-30-107. Private roads.** Private roads may be opened in the manner prescribed by this chapter, but in every case the necessity of the road and the amount of all damage to be sustained by the opening thereof shall be first determined by a jury, and such amount, together with the expenses of the proceeding, shall be paid by the person to be benefited.

**History: En. Sec. 2232, C. Civ. Proc. 1895; re-en. Sec. 7352, Rev. C. 1907; re-en. Sec. 9955, R.C.M. 1921; re-en. Sec. 9955, R.C.M. 1935; R.C.M. 1947, 93-9923.**

**70-30-108. No abrogation of provisions relating to city or county roads.** Nothing in this code must be construed to abrogate or repeal any statute providing for the taking of property in any city, town, or county for road or street purposes.

**History: En. Sec. 2233, C. Civ. Proc. 1895; re-en. Sec. 7353, Rev. C. 1907; re-en. Sec. 9956, R.C.M. 1921; re-en. Sec. 9956, R.C.M. 1935; R.C.M. 1947, 93-9924.**

**70-30-109. Temporary logging roads and banking grounds.** (1) In the event that temporary roads for logging purposes or grounds for banking purposes are opened or taken, the same shall include only the temporary right to use the same, and the order of condemnation for said road shall fix the length of time and the date from which such road shall be opened or land shall be used, and at the expiration of said period so fixed, the right to use said road or land shall cease, and the use of said land shall revert to the party from whom the same is taken or to his legal successor in interest; provided, that no lands or grounds shall be taken for such temporary logging roads or banking grounds for a period of time longer than 5 years, and when taken for a period of time exceeding 1 year, the amount of damage for such year shall be fixed separately, and the amount fixed for each particular year must be paid on or before January 1 of each year; and in the event that the amount so fixed for any one year is not paid as herein specified, then and in that event the use of such lands shall revert to the party from whom the same is taken or to his successor in interest.

(2) In any suit for the opening of any temporary logging road or for the use of any ground or land for banking purposes, the court shall not finally order the opening of such road or the right to use such land or ground until the amount assessed as damages has been paid into court for the benefit of the party or parties owning or holding such land.

(3) In the event that any such land is occupied by a lessee, such lessee shall be made a party to the suit, and the final decree of the court shall apportion the

amount of compensation received between the lessee and the owner of such lands, such decree being subject to the right of appeal of any party in interest.

**History: En. Sec. 1, Ch. 89, L. 1907; re-en. Secs. 7354, 7355, Rev. C. 1907; re-en. Secs. 9957, 9958, R.C.M. 1921; re-en. Secs. 9957, 9958, R.C.M. 1935; R.C.M. 1947, 93-9925, 93-9926.**

**70-30-110. Survey and location of property to be taken — greatest public good — least private injury.** In all cases where land is required for public use, the state or its agents in charge of such use may survey and locate the same, but it must be located in the manner which will be most compatible with the greatest public good and the least private injury and subject to the provisions of 70-30-206. The state or its agents in charge of such public use may enter upon the land and make examination, surveys, and maps thereof, and such entry shall constitute no cause of action in favor of the owners of the land except from injuries resulting from negligence, wantonness, or malice.

**History: En. Sec. 584, p. 191, L. 1877; re-en. Sec. 584, 1st Div. Rev. Stat. 1879; re-en. Sec. 602, 1st Div. Comp. Stat. 1887; re-en. Sec. 2215, C. Civ. Proc. 1895; re-en. Sec. 7335, Rev. C. 1907; re-en. Sec. 9938, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1242; re-en. Sec. 9938, R.C.M. 1935; R.C.M. 1947, 93-9906.**

**70-30-111. Facts necessary to be found before condemnation.** Before property can be taken, it must appear:

(1) that the use to which it is to be applied is a use authorized by law;

(2) that the taking is necessary to such use;

(3) if already appropriated to some public use, that the public use to which it is to be applied is a more necessary public use.

**History: En. Sec. 583, p. 191, L. 1877; re-en. Sec. 583, 1st Div. Rev. Stat. 1879; re-en. Sec. 601, 1st Div. Comp. Stat. 1887; amd. Sec. 2214, C. Civ. Proc. 1895; re-en. Sec. 7334, Rev. C. 1907; re-en. Sec. 9937, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1241; re-en. Sec. 9937, R.C.M. 1935; amd. Sup. Ct. Ord. 11020, eff. January 1, 1966; R.C.M. 1947, 93-9905(part).**

## Part 2

## Preliminary Procedure

**70-30-201. Applicable rules of practice.** Except as otherwise provided in this chapter, the provisions of [93-2301 to 93-8717] are applicable to and constitute the rules of practice in the proceedings mentioned in this chapter.

**History: En. Sec. 2231, C. Civ. Proc. 1895; re-en. Sec. 7351, Rev. C. 1907; re-en. Sec. 9954, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1256; re-en. Sec. 9954, R.C.M. 1935; R.C.M. 1947, 93-9922.**

**70-30-202. Jurisdiction and venue — complaint and summons required.** All proceedings under this chapter must be brought in the district court of the county in which the property or some part thereof is situated. They must be commenced by filing a complaint and issuing a summons thereon.

**History: En. Sec. 585, p. 191, L. 1877; re-en. Sec. 585, 1st Div. Rev. Stat. 1879; re-en. Sec. 603, 1st Div. Comp. Stat. 1887; re-en. Sec. 2216, C. Civ. Proc. 1895; re-en. Sec. 7336, Rev. C. 1907; re-en. Sec. 9939, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1243; re-en. Sec. 9939, R.C.M. 1935; amd. Sec. 1, Ch. 22, L. 1937; R.C.M. 1947, 93-9907.**

**70-30-203. Contents of complaint.** The complaint must contain:

(1) the name of the corporation, association, commission, or person in charge of the public use for which the property is sought, who must be styled plaintiff;

(2) the names of all owners, mortgagees, and lienholders of record and any other claimants of the property of record, if known, or a statement that they are unknown, who must be styled defendants;

(3) a statement of the right of plaintiff;

(4) if a right-of-way is sought, the complaint must show the location, general route, and termini and must be accompanied with a map thereof, so far as the same is involved in the action or proceeding;

(5) a description of each piece of land sought to be taken and whether the same includes the whole or only a part of the entire parcel or tract. All parcels lying in the county and required for the same public use may be included in the same or separate proceedings, at the option of the plaintiff, but the court may consolidate or separate them to suit the convenience of the parties. When application for the condemnation of a right-of-way for the purposes of sewerage is made on behalf of a settlement or a town or a county, the county commissioners of the county may be named as plaintiff.

(6) if a sand, stratum, or formation suitable for use as an underground natural gas storage reservoir is sought to be appropriated, a description thereof and of the land in which it is alleged to be contained and a description of all other property and rights sought to be appropriated for use in connection with the appropriation of the right to store natural gas in and withdraw natural gas from such reservoir. In addition, the complaint shall state facts showing that the underground reservoir is one subject to appropriation by plaintiff; also stating that the underground storage of natural gas in the land sought to be appropriated is in the public interest; that the underground reservoir is suitable and practicable for natural gas storage; that the plaintiff in good faith has been unable to acquire the rights sought to be appropriated hereunder and a statement that the rights and property sought to be appropriated are not prohibited by law; and in addition, the complaint must be accompanied by a certificate from the board of oil and gas conservation as set forth in 82-10-304.

**History: En. Sec. 586, p. 192, L. 1877; re-en. Sec. 586, 1st Div. Rev. Stat. 1879; re-en. Sec. 604, 1st Div. Comp. Stat. 1887; amd. Sec. 2217, C. Civ. Proc. 1895; re-en. Sec. 7337, Rev. C. 1907; re-en. Sec. 9940, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1244; re-en. Sec. 9940, R.C.M. 1935; amd. Sec. 3, Ch. 245, L. 1953; amd. Sec. 8, Ch. 259, L. 1955; amd. Sec. 1, Ch. 197, L. 1973; amd. Sec. 206, Ch. 253, L. 1974; R.C.M. 1947, 93-9908.**

**70-30-204. Summons — contents — how served.** (1) The clerk must issue a summons which must contain:

(a) the names of the parties;

(b) a description of the lands and other property proposed to be taken;

(c) a statement of the public use for which it is sought; and

(d) a notice to the defendants to file and serve upon the plaintiff an answer within 15 days from date of service of summons and to appear before the court or judge, at a time and place therein specified, and show cause why the property described should not be condemned as prayed for in the complaint.

(2) Such summons must, in other particulars, be in form of a summons in a civil action and must be served in like manner upon each defendant named therein at least 20 days previous to the time designated in such notice for the hearing. A copy of the complaint must be served with the summons upon each defendant named. But the failure to make such service upon a defendant does not affect the right to proceed against any or all other of the defendants upon whom service of summons had been made.

**History: En. Sec. 587, p. 192, L. 1877; re-en. Sec. 587, 1st Div. Rev. Stat. 1879; re-en. Sec. 605, 1st Div. Comp. Stat. 1887; amd. Sec. 2218, C. Civ. Proc. 1895;**

**re-en. Sec. 7338, Rev. C. 1907; re-en. Sec. 9941, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1245; re-en. Sec. 9941, R.C.M. 1935; amd. Sec. 9, Ch. 259, L. 1955; amd. Sec. 1, Ch. 234, L. 1961; R.C.M. 1947, 93-9909.**

**70-30-205. Who may defend — answer.** (1) All persons named in the complaint, in occupation of or claiming an interest in any of the property described in the complaint or in the amount to be awarded for the taking thereof, though not named, may appear.

(2) The answer of each appearing defendant must be filed and served upon the plaintiff or upon any attorney for plaintiff within a period of 15 days after the service of summons and complaint. The answer of each appearing defendant must contain a specific allegation as to the total amount which such defendant claims is reasonable and just for the taking of such defendant's lands or other real property or interest therein.

**History: En. Sec. 588, p. 192, L. 1877; re-en. Sec. 588, 1st Div. Rev. Stat. 1879; re-en. Sec. 606, 1st Div. Comp. Stat. 1887; amd. Sec. 2219, C. Civ. Proc. 1895; re-en. Sec. 7339, Rev. C. 1907; re-en. Sec. 9942, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1246; re-en. Sec. 9942, R.C.M. 1935; amd. Sec. 2, Ch. 234, L. 1961; R.C.M. 1947, 93-9910.**

**70-30-206. Powers of court — preliminary condemnation order.** (1) The court or judge has power to:

(a) regulate and determine the place and manner of making the connections and crossings and enjoying the common uses mentioned in 70-30-103(1)(e) and of the occupying of canyons, passes, and defiles for railroad purposes, as permitted and regulated by the laws of this state or of the United States;

(b) determine whether or not the use for which the property is sought to be appropriated is a public use within the meaning of the laws of this state;

(c) limit the amount of property sought to be appropriated if in the opinion of the court or judge the quantity sought to be appropriated is not necessary.

(2) If the court or judge is satisfied from the evidence presented at the hearing provided for in 70-30-204 that the public interests require the taking of such lands and that the facts necessary to be found before condemnation appear, it or he must forthwith make and enter a preliminary condemnation order that the condemnation of the land or other real property may proceed in accordance with the provisions of this chapter.

(3) If the property sought to be appropriated is a sand, stratum, or formation suitable for use as an underground natural gas storage reservoir and the existence and suitability of it for such use has been proved by plaintiff upon substantial evidence, the order of the court or judge shall direct the commissioners to ascertain and determine the amount to be paid by the plaintiff to each person for his interest in the property sought to be appropriated for use as such underground natural gas storage reservoir and/or as the annual rental for the use of such underground gas storage reservoir and for the use of so much of the surface as is required in the operation of the underground gas storage reservoir and for the use in connection with the creation, operation, and maintenance thereof and for all the native gas contained in said reservoir as compensation and damages by reason of the appropriation of such property. However, the amount to be paid for such native gas and all thereof shall be no less than the market value of such gas. The court shall appoint three persons, qualified as experts and recommended as such by the board of oil and gas conservation, to assist and advise the commissioners in determining the compensation and damages to be paid by plaintiff to each person for his interest in the property sought to be appropriated, and the fees and expenses of such persons shall be chargeable as costs of the proceedings to be paid by the plaintiff.

**History: En. Sec. 589, p. 193, L. 1877; re-en. Sec. 589, 1st Div. Rev. Stat. 1879; re-en. Sec. 607, 1st Div. Comp. Stat. 1887; amd. Sec. 2220, C. Civ. Proc. 1895; re-en. Sec. 7340, Rev. C. 1907; re-en. Sec. 9943, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1247; re-en. Sec. 9943, R.C.M. 1935; amd. Sec. 4, Ch. 245, L. 1953; amd. Sec.**

**10, Ch. 259, L. 1955; amd. Sec. 3, Ch. 234, L. 1961; amd. Sec. 207, Ch. 253, L. 1974; R.C.M. 1947, 93-9911.**

**70-30-207. Appointment of commissioners — qualifications — affidavit.** (1) Immediately upon making and entering the preliminary condemnation order, the judge must meet with the respective parties or their attorneys of record for the purpose of appointing condemnation commissioners to ascertain and determine the amount to be paid by the plaintiff to each owner or other persons interested in such property by reason of the appropriation of such property.

(2) The court must thereupon appoint three qualified, disinterested condemnation commissioners. One of such commissioners shall be nominated by the party or parties plaintiff. One of such commissioners shall be nominated by the party or parties defendant. The third commissioner shall be the chairman and shall be nominated by the two commissioners previously nominated. However, if said two commissioners fail to make such choice at the time of their appointment, then such nomination shall be made by the presiding judge.

(3) Each commissioner shall possess the following qualifications:

(a) a citizen of the United States and over 18 years of age;

(b) that he is not more than 70 years of age;

(c) that he is in possession of natural faculties, of ordinary intelligence, and not decrepit;

(d) that he is possessed of sufficient knowledge of the English language;

(e) that he was assessed on the last assessment roll of a county within the judicial district in which the action is pending;

(f) that he has not been convicted of malfeasance in office or any felony or other high crime;

(g) that he is not related within the sixth degree to any party;

(h) that he does not stand in the relation of guardian and ward, master and servant, debtor and creditor, or principal and agent or partner or surety as to any party.

(4) At the time of such meeting and nominations, there shall be filed with the court by each nominating party or judge an affidavit of the person so nominated stating substantially as follows:

(a) that he has formed no unqualified opinion or belief as to the compensation to be awarded in the proceeding or as to the fairness or unfairness of the plaintiff's offer for the lands and improvements of the defendants;

(b) that he has no enmity against or bias in favor of any party and has not discussed, communicated, or overheard or read any discussion or communication from any party relating to values of the lands in question or the compensation offered, demanded, or to be awarded;

(c) that if selected as a condemnation commissioner, he is willing to serve and will well and truly try the issues of compensation and render a true decision according to the evidence and in compliance with the instructions of the court;

(d) that he will not discuss the case with anyone except the other commissioners until a decision has been filed with the court.

**History: En. Sec. 608, 1st Div. Comp. Stat. 1887; amd. Sec. 1, p. 269, L. 1891; amd. Sec. 2221, C. Civ. Proc. 1895; re-en. Sec. 7341, Rev. C. 1907; re-en. Sec. 9944, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1248; re-en. Sec. 9944, R.C.M. 1935; amd. Sec. 4, Ch. 234, L. 1961; amd. Sec. 19, Ch. 423, L. 1971; R.C.M. 1947, 93-9912(part).**

## Part 3

## Hearing, Judgment, and Subsequent Proceedings

**70-30-301. Hearing — judge to preside — determinations by commissioners.** (1) Immediately upon nomination and appointment of commissioners under 70-30-207, the same shall proceed to meet at the time and place stated in the order appointing them, which time shall not be more than 10 days after the order of appointing, and proceed to examine the lands sought to be appropriated. At a time appointed by the judge and within said 10-day period they shall hear the allegations and evidence of all persons interested in each of the several parcels of land.

(2) Such hearing shall be attended by and presided over by the presiding judge who shall make all necessary rulings upon procedure and the admissibility of evidence.

(3) At the conclusion of the aforesaid hearing, the court or judge shall instruct the commissioners as to the law applicable to their deliberations and shall instruct them that their duty is to determine, solely upon the basis of said examination of lands, the evidence produced at the hearing or hearings, and the instructions of the court, the following:

(a) the value of the property sought to be appropriated and all improvements thereon pertaining to the realty and of each and every separate estate and interest therein. If it consists of different parcels, the value of each parcel and each estate or interest therein must be separately assessed.

(b) if the property sought to be appropriated constitutes only a part of a larger parcel, the depreciation in value which will accrue to the portion not sought to be condemned by reason of its severance from the portion sought to be condemned and the construction of the improvements in the manner proposed by the plaintiff;

(c) separately, how much the portion not sought to be condemned and each estate or interest therein will be benefited, if at all, by the construction of the improvements proposed by the plaintiff; and if the benefit shall be equal to the amount assessed under subsection (3)(b), the owner of the parcel shall be allowed no compensation except the value of the portion taken; but if the benefits shall be less than the amount assessed under subsection (3)(b), the former shall be deducted from the latter, and the remainder shall be the only amount allowed in addition to the value;

(d) if the property sought to be condemned be for a railroad, the cost of good and sufficient fences along the line of such railroad and the cost of cattle guards where fences may cross the line of such railroad.

(4) Where there are two or more estates or divided interests in property sought to be condemned, the plaintiff is entitled to have the amount of the award for said property first determined, as hereinbefore stated, as between plaintiff and all defendants claiming any interests therein. Thereafter in the same proceeding the respective rights of each of such defendants in and to the award shall be determined by the commissioners, under supervision and instruction of the court, and the award apportioned accordingly.

**History: En. Sec. 608, 1st Div. Comp. Stat. 1887; amd. Sec. 1, p. 269, L. 1891; amd. Sec. 2221, C. Civ. Proc. 1895; re-en. Sec. 7341, Rev. C. 1907; re-en. Sec. 9944, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1248; re-en. Sec. 9944, R.C.M. 1935; amd. Sec. 4, Ch. 234, L. 1961; amd. Sec. 19, Ch. 423, L. 1971; R.C.M. 1947, 93-9912(part).**

**70-30-302. Assessing compensation — date and measure — interest.** (1) For the purpose of assessing compensation, the right thereto shall be deemed to have accrued at the date of the service of the summons, and its actual value as of that date shall be the measure of compensation for all property to be actually taken and the basis of depreciation in value of property not actually taken but injuriously affected. This shall not be construed to limit the amount of compensation payable by the department of highways under the provisions of any legislation enacted pursuant to the federal Highway Beautification Act of 1965.

(2) If an order be made letting the plaintiff into possession, as provided in 70-30-311, the full amount finally awarded shall draw interest at the rate of 10%

per annum from the date on which the property owner surrenders possession of the property in accordance with the terms of such order to the earlier of the following dates:

(a) the date on which the right to appeal to the Montana supreme court expires or, if appeal is filed, to the date of final decision by the supreme court; or

(b) the date on which the property owner withdraws from court the full amount finally awarded.

(3) If the property owner withdraws from court a fraction of the amount finally awarded, interest on such fraction shall cease on the date it is withdrawn but interest on the remainder of the amount finally awarded shall continue to the earlier of the aforesaid dates defined in (2)(a) and (2)(b) of this section until the full amount is withdrawn from the court.

(4) None of the amount finally awarded shall draw interest after the date on which the right to appeal to the Montana supreme court expires.

(5) No improvements put upon the property subsequent to the date of the service of summons shall be included in the assessment of compensation or depreciation in value, nor shall the same be used as the basis of computing such compensation or depreciation.

**History: En. Sec. 591, p. 194, L. 1877; re-en. Sec. 591, 1st Div. Rev. Stat. 1879; re-en. Sec. 609, 1st Div. Comp. Stat. 1887; amd. Sec. 2222, C. Civ. Proc. 1895; re-en. Sec. 7342, Rev. C. 1907; re-en. Sec. 9945, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1249; re-en. Sec. 9945, R.C.M. 1935; amd. Sec. 1, Ch. 133, L. 1957; amd. Sec. 5, Ch. 234, L. 1961; amd. Sec. 1, Ch. 182, L. 1965; amd. Sec. 1, Ch. 187, L. 1867; amd. Sec. 12, Ch. 212, L. 1969; amd. Sec. 208, Ch. 316, L. 1974; amd. Sec. 1, Ch. 534, L. 1975; R.C.M. 1947, 93-9913.**

**70-30-303. Final report and award of commissioners — procedure on failure to agree.** (1) The report of commissioners shall be made on such forms as are provided for their use by authority of the court. Such report must be filed within 10 days after the completion of the hearing or within such additional time as may be allowed by the judge upon a clear showing of necessity therefor and must be filed with the clerk of court, and the clerk must forthwith notify the parties interested that such report has been filed, with notice, together with a true copy of said report, must be served upon all the parties interested, in the same manner as a summons.

(2) A concurrence of two commissioners shall be necessary to the making of a final report or award as to any parcel of property or interest therein. In the event that no two of the commissioners are able to agree as to the amount of any award, they shall report such fact to the judge or court within the time hereinbefore specified and the court must forthwith impanel and appoint new commissioners as hereinbefore provided, which commissioners shall proceed as provided before herein to determine any award upon which the previous commissioners failed to agree.

(3) The report of said commissioners shall also state the number of days or portions thereof consumed by the commissioners in performance of their duties as prescribed herein.

**History: En. Sec. 2223, C. Civ. Proc. 1895; re-en. Sec. 7343, Rev. C. 1907; re-en. Sec. 9946, R.C.M. 1921; re-en. Sec. 9946, R.C.M. 1935; amd. Sec. 6, Ch. 234, L. 1961; R.C.M. 1947, 93-9914.**

**70-30-304. Appeal to district court from assessment of commissioners.** (1) An appeal from any assessment made by the commissioners may be taken and prosecuted in the court where the report of said commissioners is filed by any party interested. Such appeal must be taken within the period of 30 days after the service upon appellant of the notice of the filing of the award by the service of notice of such appeal upon the opposing party or his attorney in such proceedings and the filing of the same in the district court wherein the action is pending, and the same shall be brought on for trial upon the same notice and in the same manner as other civil actions, and unless a jury shall be waived by the consent of all parties to such appeal, the same shall be tried by jury, and the amount to which appellant may be entitled, by reason of the appropriation of his property, shall be reassessed upon the same principle as hereinbefore prescribed for the assessment of such amount by commissioners.

(2) Upon any verdict or assessment by commissioners becoming final, judgment shall be entered declaring that upon payment of such verdict or assessment, together with the interests and costs allowed by law, if any, the right to construct and maintain the highway, railroad, or other public work or improvement and to take, use, and appropriate the property described in such verdict or assessment for the use and purposes for which said land has been condemned shall, as against the parties interested in such verdict or assessment, be and remain in the plaintiff and his or its heirs, successors, or assigns forever.

(3) In case the party appealing from the award of the commissioners in any proceeding, as aforesaid, shall not succeed in changing to his advantage the amount finally awarded in such proceeding, he shall not recover the costs of such appeal, but all the costs of the appellee upon such appeal shall be taxed against and recovered from the appellant; provided, that upon the trial of such appeal, the plaintiff may contest the right of any party or parties thereto to any of the property mentioned and set forth or involved in said appeal, which was located after the preliminary survey of any such highway or railroad, seeking to condemn its right-of-way under and pursuant to the provisions of this chapter, provided such condemnation proceedings are begun within 1 year after such preliminary survey.

**History: En. Sec. 608, p. 220, L. 1887; re-en. Sec. 2224, C. Civ. Proc. 1895; re-en. Sec. 7344, Rev. C. 1907; re-en. Sec. 9947, R.C.M. 1921; amd. Sec. 1, Ch. 145, L. 1927; re-en. Sec. 9947, R.C.M. 1935; amd. Sec. 7, Ch. 234, L. 1961; R.C.M. 1947, 93-9915.**

**70-30-305. Condemnor to make offer upon appeal — award of expenses of litigation.** (1) The condemnor shall, within 30 days after an appeal is perfected from the commissioner's award or report, submit to condemnee a written final offer of judgment for the property to be condemned, together with necessary expenses of condemnee then accrued. If at any time prior to 10 days before trial the condemnee serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance, together with proof of service thereof, and thereupon judgment shall be entered. An offer not accepted shall be deemed withdrawn and evidence thereof is not admissible at the trial except in a proceeding to determine costs. The fact that an offer is made but not accepted does not preclude a subsequent offer.

(2) In the event of litigation and when the private property owner prevails by receiving an award in excess of the final offer of the condemnor, the court shall award necessary expenses of litigation to the condemnee.

**History: En. 93-9921.1 by Sec. 1, Ch. 453, L. 1973; R.C.M. 1947, 93-9921.1.**

**70-30-306. Necessary expenses of litigation defined.** (1) Necessary expenses of litigation as authorized by 70-30-305 mean reasonable and necessary attorney fees, expert witness fees, exhibit costs, and court costs.

(2) Reasonable and necessary attorney fees are the customary hourly rates for an attorney's services in the county in which trial is held. Reasonable and necessary attorney fees shall be computed on an hourly basis and may not be computed on the basis of any contingent fee contract entered into after July 1, 1977.

(3) Reasonable and necessary expert witness fees may not exceed the customary rate for the services of a witness of such expertise in the county in which trial is held.

**History: En. 93-9921.2 by Sec. 1, Ch. 48, L. 1977; R.C.M. 1947, 93-9921.2.**

**70-30-307. When payment of compensation to be made — deposit of bond.** The plaintiff must within 30 days after final judgment pay the sum of money assessed but may at the time of or before the payment elect to build the fences and cattle guards and, if he so elect, shall execute to the defendant a bond with sureties to be approved by the court, in double the assessed cost of the same, to build such fences and cattle guards within 8 months from the time the railroad is built on the land taken and, if such bond be given, need not pay the cost of such fences and cattle guards. In an action on such bond, the plaintiff may recover reasonable attorney's fees.

**History: En. Sec. 593, p. 194, L. 1877; re-en. Sec. 593, 1st Div. Rev. Stat. 1879; re-en. Sec. 611, 1st Div. Comp. Stat. 1887; amd. Sec. 2226, C. Civ. Proc. 1895; re-en. Sec. 7346, Rev. C. 1907; re-en. Sec. 9949, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1251; re-en. Sec. 9949, R.C.M. 1935; R.C.M. 1947, 93-9917.**

**70-30-308. How payment made — execution or annulment for nonpayment.** (1) Payment may be made to the defendants entitled thereto, or the money may be deposited in court for the defendants and be distributed to those entitled thereto.

(2) If the money be not so paid or deposited, the defendants may have execution as in civil cases, and if the money cannot be made on execution, the court or judge, upon a showing to that effect, must set aside and annul the entire proceedings and restore possession of the property to the defendant if possession has been taken by the plaintiff.

**History: En. Sec. 594, p. 194, L. 1877; re-en. Sec. 594, 1st Div. Rev. Stat. 1879; re-en. Sec. 612, 1st Div. Comp. Stat. 1887; re-en. Sec. 2227, C. Civ. Proc. 1895; re-en. Sec. 7347, Rev. C. 1907; re-en. Sec. 9950, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1252; re-en. Sec. 9950, R.C.M. 1935; R.C.M. 1947, 93-9918.**

**70-30-309. Final order of condemnation — contents — vesting upon filing.** (1) When payments have been made and the bond given, if the plaintiff elects to give one, as required by 70-30-307 and 70-30-308, the court or judge must make a final order of condemnation, which must describe the property condemned and the purposes of such condemnation.

(2) A copy of the order must be filed in the office of the county clerk and recorder, and thereupon the property described therein shall vest in the plaintiff for the purposes therein specified.

**History: En. Sec. 595, p. 195, L. 1877; re-en. Sec. 595, 1st Div. Rev. Stat. 1879; re-en. Sec. 613, 1st Div. Comp. Stat. 1887; re-en. Sec. 2228, C. Civ. Proc. 1895; re-en. Sec. 7348, Rev. C. 1907; re-en. Sec. 9951, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1253; re-en. Sec. 9951, R.C.M. 1935; R.C.M. 1947, 93-9919.**

**70-30-310. New proceedings to cure defective title.** If the title attempted to be acquired is found to be defective from any cause, the plaintiff may again institute proceedings to acquire the same, as in this chapter prescribed.

**History: En. Sec. 592, p. 194, L. 1877; re-en. Sec. 592, 1st Div. Rev. Stat. 1879; re-en. Sec. 610, 1st Div. Comp. Stat. 1887; re-en. Sec. 2225, C. Civ. Proc. 1895; re-en. Sec. 7345, Rev. C. 1907; re-en. Sec. 9948, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1250; re-en. Sec. 9948, R.C.M. 1935; R.C.M. 1947, 93-9916.**

**70-30-311. Putting plaintiff in possession.** (1) At any time after the filing of the preliminary condemnation order or after the report and assessment of the commissioners have been made and filed in the court and either before or after appeal from such assessment or from any other order or judgment in the proceedings, the court or any judge thereof at chambers upon application of the plaintiff shall have power to make an order that, upon payment into court for the defendant entitled thereto of the amount of compensation claimed by the defendant in his answer or the amount assessed either by the commissioners or by the jury, as the case may be, the plaintiff be authorized:

(a) if already in possession of the property of such defendant sought to be appropriated, to continue in such possession; or

(b) if not in possession, to take possession of such property and use and possess the same during the pendency and until the final conclusion of the proceedings and litigation and that all actions and proceedings against the plaintiff on account thereof be stayed until such time.

(2) However, where an appeal is taken by such defendant, the court or judge may, in its or his discretion, require the plaintiff before continuing or taking such possession, in addition to paying into court the amount assessed, to give bond or undertaking with sufficient sureties to be approved by the judge and to be in such sum as the court or judge may direct, conditioned to pay the defendant any additional damages and costs over and above the amount assessed, which it may finally be determined that defendant is entitled to for the appropriation of the property, and all damages which defendant may sustain if for any cause such property shall not be finally taken for public uses.

(3) The amount assessed by the commissioners or by the jury on appeal, as the case may be, shall be taken and considered, for the purposes of this section, until reassessed or changed in the further proceedings, as just compensation for the property appropriated; but the plaintiff, by payment into court of the amount claimed in the answer or the amount assessed or by giving security as above provided, shall not be thereby prevented or precluded from appealing from such assessment but may appeal in the same manner and with the same effect as if no money had been deposited or security given. In all cases where the plaintiff deposits the amount of the assessment and continues in possession or takes possession of the property, as herein provided, the defendant entitled thereto, if there be no dispute as to the ownership of the property, may at any time demand and receive upon order of the court all or any part of the money so deposited and shall not by such demand or receipt be barred or precluded from his right of appeal from such assessment but may, notwithstanding, take and prosecute his appeal from such assessment; provided that if the amount of such assessment is finally reduced on appeal by either party, such defendant who has received all or any part of the amount deposited shall be liable to the plaintiff for any excess of the amount so received by him over the amount finally assessed, with legal interest on such excess from the time such defendant received the money deposited, and the same may be recovered by action; and provided, further, that upon any appeal from assessment by the commissioners to a jury, the jury may find a less as well as an equal or greater amount than that assessed by the commissioners; and provided, further, that the court shall not order the delivery to any defendant of more than 75% of the money deposited on his account except upon posting of bond by such defendant equal to the amount in excess of 75%, with sureties to be approved by the court, to repay to the plaintiff such amounts withdrawn as are in excess of his final award in the proceedings.

**History: En. Sec. 596, p. 195, L. 1877; re-en. Sec. 596, 1st Div. Rev. Stat. 1879; amd. Sec. 614, 1st Div. Comp. Stat. 1887; amd. Sec. 2, p. 272, L. 1891; en. Sec. 2229, C. Civ. Proc. 1895; re-en. Sec. 7349, Rev. C. 1907; re-en. Sec. 9952, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1254; re-en. Sec. 9952, R.C.M. 1935; amd. Sec. 8, Ch. 234, L. 1961; R.C.M. 1947, 93-9920.**

**70-30-312. Appeal to supreme court.** (1) The plaintiff or defendant or any party interested in the proceedings can appeal to the supreme court from any finding or judgment made or rendered under this chapter, as in other cases.

(2) Such appeal does not stay any further proceedings under this chapter, except that the district court on motion or ex parte may grant a stay for such period of time and under such conditions as the court deems proper.

**History: En. Sec. 583, p. 191, L. 1877; re-en. Sec. 583, 1st Div. Rev. Stat. 1879; re-en. Sec. 601, 1st Div. Comp. Stat. 1887; amd. Sec. 2214, C. Civ. Proc. 1895; re-en. Sec. 7334, Rev. C. 1907; re-en. Sec. 9937, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1241; re-en. Sec. 9937, R.C.M. 1935; amd. Sup. Ct. Ord. 11020, eff. January 1, 1966; R.C.M. 1947, 93-9905(part).**

# CHAPTER 31

# RELOCATION ASSISTANCE FAIR TREATMENT OF CONDEMNEES

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## Part 1

## General Provisions

**70-31-101. Purpose.** It is the purpose of this chapter to:

(1) provide for uniform and equitable treatment of persons displaced from their homes, businesses, or farms as a result of federally assisted programs;

(2) establish uniform and equitable land acquisition policies for federally assisted programs; and

(3) comply with the federal Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970.

**History: En. Sec. 1, Ch. 3, 2nd Ex. L. 1971; R.C.M. 1947, 93-9927.**

**70-31-102. Definitions.** As used in this chapter, unless the context otherwise requires, the following definitions apply:

(1) "Agency" means the state of Montana, a political subdivision of the state, or any department, agency, or instrumentality of the state of Montana or of a political subdivision of the state.

(2) "Average annual net earnings" means one-half of any net earnings of a business or farm operation, before federal and state income taxes, during the 2 taxable years immediately preceding the taxable year in which such business or farm operation moves from real property acquired for a project of an agency (for which federal financial assistance is available to pay all or any part of the cost) or during such other period as the acquiring agency determines to be more equitable for establishing such earnings and includes any compensation paid by the business or farm operation to the owner, his spouse, or his dependents during such period.

(3) "Business" means any lawful activity, excepting a farm operation, conducted primarily:

(a) for the purchase, sale, lease, and rental of personal and real property and for the manufacture, processing, or marketing of products, commodities, or any other personal property;

(b) for the sale of services to the public;

(c) by a nonprofit organization; or

(d) solely for the purposes of 70-31-201(1), for assisting in the purchase, sale, resale, manufacture, processing, or marketing of products, commodities, personal property, or services by the erection and maintenance of an outdoor advertising display or displays, whether or not such display or displays are located on the premises on which any of the above activities are conducted.

(4) "Displaced person" means any person who on or after July 1, 1971, moves from real property or moves his personal property from real property as a result of the acquisition of such real property, in whole or in part, or as the result of the written order of an acquiring agency to vacate real property for a program or project undertaken by the agency for which federal financial assistance will be available to pay all or any part of the cost; and solely for the purposes of 70-31-201(1) and (2) and 70-31-204, as a result of the acquisition of or as the result of the written order of the acquiring agency to vacate other real property, on which such person conducts a business or farm operation, for such program or project. The term "displaced person" also includes a person who moves or discontinues his business or moves other personal property or moves from his dwelling as the direct result of code enforcement activities or a program of rehabilitation of buildings conducted pursuant to a federal program.

(5) "Farm operation" means any activity conducted solely or primarily for the production of one or more agricultural products or commodities, including timber, for sale or home use and customarily producing such products or commodities in sufficient quantity to be capable of contributing materially to the operator's support.

(6) "Federal act" means the "Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970" or as that act may be amended.

(7) "Federal financial assistance" means a grant, loan, or contribution provided by the United States, except any federal guarantee or insurance.

(8) "Person" means any individual, partnership, corporation, or association.

**History: En. Sec. 2, Ch. 3, 2nd Ex. L. 1971; R.C.M. 1947, 93-9928.**

**70-31-103. Application to all federally assisted programs.** This chapter shall apply to all acquisitions of real property by an agency for a program or project for which federal financial assistance is available to pay all or any part of the cost.

**History: En. Sec. 18, Ch. 3, 2nd Ex. L. 1971; R.C.M. 1947, 93-9944.**

**70-31-104. New rights and powers not created.** (1) Nothing in this chapter shall be construed as creating, in any condemnation proceedings brought under the power of eminent domain, any element of value or damage not in existence immediately prior to July 1, 1971.

(2) Nothing in this chapter shall be construed as, directly or indirectly, granting any new or additional power of eminent domain.

**History: En. Sec. 17, Ch. 3, 2nd Ex. L. 1971; R.C.M. 1947, 93-9943(2), (3).**

**70-31-105. Duplication of eminent domain payments not intended.** No payment or assistance provided for in this chapter shall be required to be made by an agency if the displaced person receives a payment required by the laws of eminent domain which is determined by the agency to have substantially the same purpose and effect as such payment under this chapter.

**History: En. Sec. 16, Ch. 3, 2nd Ex. L. 1971; R.C.M. 1947, 93-9942.**

**70-31-106. Payments not income under tax laws or other assistance laws.** No payment received by a displaced person under this chapter shall be considered as income or resources for the purpose of determining the eligibility of any person for assistance under any state law or for the purposes of determining income under state tax laws.

**History: En. Sec. 9, Ch. 3, 2nd Ex. L. 1971; R.C.M. 1947, 93-9935.**

## Part 2

## Relocation Payments, Assistance, and Advisory Services

**70-31-201. Payments to displaced persons — moving expense — business losses.** (1) Whenever the acquisition of real property for a program or project of an agency (for which federal financial assistance is available to pay all or any part of the cost) will result in the displacement of any person, the agency shall make payment to the displaced person, upon application as approved by the agency, for:

(a) actual reasonable expenses in moving himself, his family, business, farm operation, or other personal property;

(b) actual direct losses of tangible personal property as a result of moving or discontinuing a business or farm operation but not to exceed an amount equal to the reasonable expenses that would have been required to relocate such property, as determined by the agency; and

(c) actual reasonable expenses in searching for a replacement business or farm.

(2) In lieu of payments for actual expenses and losses under subsection (1) of this section, a person who is displaced from a dwelling may elect to receive a moving expense allowance determined according to a schedule established by the agency and a dislocation allowance, neither of which may exceed the maximum allowances under section 202(b) of the federal act.

(3) In lieu of payments for actual expenses and losses under subsection (1), a person who is displaced from his place of business or from his farm operation may receive a fixed payment in an amount equal to the average annual net earnings of the business or farm operation provided that:

(a) the payment shall not be less or more than the amounts set forth in section 202(c) of the federal act;

(b) in the case of a business, no payment shall be made under this subsection unless the acquiring agency is satisfied that the business cannot be relocated without a substantial loss of its existing patronage and is not a part of a commercial enterprise having at least one other establishment not being acquired by an agency which is engaged in the same or similar business.

**History: En. Sec. 3, Ch. 3, 2nd Ex. L. 1971; R.C.M. 1947, 93-9929.**

**70-31-202. Additional payments for displacement from dwelling owned by occupant.** (1) In addition to payments otherwise authorized by this chapter, the acquiring agency shall make an additional payment to any displaced person who is displaced from a dwelling actually owned and occupied by such displaced person for not less than 180 days prior to the initiation of negotiations for the acquisition of the property. The additional payment shall include the following elements:

(a) the amount may not exceed the amount allowed under section 203 of the federal act;

(b) the amount, if any, which when added to the acquisition cost of the dwelling acquired by the agency equals the reasonable cost of a comparable replacement dwelling which is a decent, safe, and sanitary dwelling adequate to accommodate such displaced person, reasonably accessible to public services and places of employment and available on the private market. All determinations required to carry out this subsection (1)(b) shall be made in accordance with regulations issued by the acquiring agency.

(c) the amount, if any, which will compensate the displaced person for any increased interest costs which the person is required to pay for financing the acquisition of any comparable replacement dwelling. The amount shall be paid only if the dwelling acquired by the agency was encumbered by a bona fide mortgage which was a valid lien on such dwelling for not less than 180 days prior to the initiation of negotiations for the acquisition of the dwelling. The amount shall be equal to the excess in the aggregate interest and other debt service costs of that amount of the principal of the mortgage on the replacement dwelling which is equal to the unpaid balance of the mortgage on the acquired dwelling over the remainder term of the mortgage on the acquired dwelling reduced to discounted present value. The discount rate shall be the prevailing interest rate paid on savings deposits by commercial banks in the general area in which the replacement dwelling is located.

(d) reasonable expenses incurred by the displaced person for evidence of title, recording fees, and other closing costs incident to the purchase of the replacement dwelling but not including prepaid expenses.

(2) The additional payment authorized by this section shall be made only to a displaced person who purchases and occupies a replacement dwelling which is decent, safe, and sanitary not later than the end of the 1-year period beginning on the date on which he received from the agency final payment of all costs of the acquired dwelling or on the date on which he moves from the acquired dwelling, whichever is the later date.

**History: En. Sec. 4, Ch. 3, 2nd Ex. L. 1971; R.C.M. 1947, 93-9930.**

**70-31-203. Additional payments for displacement from rented dwelling.** In addition to amounts otherwise authorized by this chapter, the acquiring agency shall make a payment to or for any displaced person displaced from any dwelling not eligible to receive a payment under 70-31-202 if the dwelling was actually and lawfully occupied by the displaced person for not less than 90 days prior to the initiation of negotiations for acquisition of such dwelling. The payment shall be either:

(1) the amount necessary to enable the displaced person to lease or rent, for a period not to exceed 4 years, a decent, safe, and sanitary dwelling of standards adequate to accommodate such person in areas not generally less desirable in regard to public utilities and public and commercial facilities and reasonably accessible to his place of employment but not to exceed the amount allowable under section 204 of the federal act; or

(2) the amount necessary to enable such person to make a down payment (including reasonable expenses for evidence of title, recording fees, and other closing costs incident to the purchase of a dwelling but not including prepaid expenses) on the purchase of a decent, safe, and sanitary dwelling of standards adequate to accommodate such person in areas not generally less desirable in regard to public utilities and public and commercial facilities. The amount payable under this subsection (2) shall not exceed the amount allowable under section 204 of the federal act and shall be subject to the same matching requirements as under said section.

**History: En. Sec. 5, Ch. 3, 2nd Ex. L. 1971; R.C.M. 1947, 93-9931.**

**70-31-204. Relocation advisory services — contracted services.** (1) Whenever the acquisition of real property for a program or project of an agency (for which federal financial assistance is available to pay all or any part of the cost) will result in the displacement of any person, the agency shall provide a relocation assistance advisory program for displaced persons which offers the services described in this section. If the acquiring agency determines that any person occupying property immediately adjacent to the real property acquired is caused substantial economic injury because of the acquisition, it may offer such person relocation advisory services.

(2) The relocation advisory service may include such budget, debt management, and related counseling services as the acquiring agency determines will assist the displaced person. The relocation assistance program shall include such measures, facilities, or services as may be necessary or appropriate in order to:

(a) determine the need, if any, of displaced persons for relocation assistance;

(b) provide current and continuing information on the availability, prices, and rentals of comparable decent, safe, and sanitary sales and rental housing and of comparable commercial properties and locations for displaced businesses;

(c) assist a displaced person displaced from his business or farm operation in obtaining and becoming established in a suitable replacement location;

(d) supply information concerning federal and state housing programs, disaster loan programs, and other federal or state programs offering assistance to displaced persons;

(e) provide other advisory services to displaced persons in order to minimize hardships to displaced persons in adjusting to relocation; and

(f) secure the coordination of relocation activities with other project activities and other planned or proposed federal or state actions in the community or nearby areas which may affect the relocation program.

(3) In order to prevent unnecessary expenses and duplication of functions and to promote uniform and effective administration of relocation assistance programs, an agency may enter into contracts with any individual, firm, association, or corporation for services in connection with such programs or may carry out its functions under this chapter through any federal or state agency having an established organization for conducting relocation assistance programs. Each agency whenever practicable shall utilize the services of state or local housing agencies or other agen-

cies having experience in the administration or conduct of similar housing assistance activities.

**History: En. Sec. 6, Ch. 3, 2nd Ex. L. 1971; R.C.M. 1947, 93-9932.**

**70-31-205. Assurance of availability of suitable replacement dwellings.** (1) Whenever the acquisition of real property for a program or project of an agency (for which federal financial assistance is available to pay all or any part of the cost) will result in the displacement of any person, the agency shall assure that, within a reasonable period of time prior to displacement, there will be available in areas not generally less desirable in regard to public utilities and public and commercial facilities and at rents or prices within the financial means of the families and individuals displaced decent, safe, and sanitary dwellings, as defined by the federal agency concerned with administering the federal financial assistance, equal in number to the number of and available to such displaced persons who require such dwellings and reasonably accessible to their places of employment.

(2) The provisions of subsection (1) create no rights or liabilities and shall not affect the validity of any property acquisition by purchase or condemnation.

**History: En. Secs. 7, 17, Ch. 3, 2nd Ex. L. 1971; R.C.M. 1947, 93-9933, 93-9943(1).**

**70-31-206. Relocation costs included in project costs — property contributed incident to federal program.** (1) The acquiring agency shall include the cost of providing payments and assistance under the provisions of this chapter in the cost of any project for which federal financial assistance is available to pay all or any part of the cost.

(2) The acquiring agency shall also provide the payments and assistance and assure the availability of replacement housing for displaced persons who are displaced as a result of real property being acquired by an agency and furnished as a required contribution incident to a federal program or project.

**History: En. Sec. 8, Ch. 3, 2nd Ex. L. 1971; R.C.M. 1947, 93-9934.**

**70-31-207. Appeal from eligibility determination.** Any person aggrieved by final administrative determination concerning eligibility for relocation payments authorized by this chapter may appeal such determination to the district court of the county in which the land acquired is located.

**History: En. Sec. 10, Ch. 3, 2nd Ex. L. 1971; R.C.M. 1947, 93-9936.**

## Part 3

## Rights and Duties Relating to Condemnation

**70-31-301. Appraisal, negotiation, and other condemnation policies mandated.** An agency which acquires real property for a program or project (for which federal financial assistance will be available to pay all or any part of the cost of such program or project) shall comply with the following policies:

(1) The agency shall make every reasonable effort to acquire expeditiously real property by negotiation.

(2) Real property shall be appraised before the initiation of negotiations, and the owner or his designated representative shall be given an opportunity to accompany the appraiser during his inspection of the property.

(3) Before the initiation of negotiations for real property, an amount shall be established which it is reasonably believed is just compensation therefor and such

amount shall be offered for the property. In no event shall such amount be less than the approved appraisal of the fair market value of such property. Any decrease or increase in the fair market value of real property prior to the date of valuation caused by the public improvement for which such property is acquired or by the likelihood that the property would be acquired for such improvement, other than that due to physical deterioration within the reasonable control of the owner, shall be disregarded in determining the compensation for the property. The owner of the real property to be acquired shall be provided with a written statement of and summary of the basis for the amount established as just compensation. Where appropriate, the just compensation for the real property acquired and for damages to remaining real property shall be separately stated.

(4) No owner shall be required to surrender possession of real property before the agreed purchase price is paid or before there is deposited with the court, in accordance with applicable law, for the benefit of the owner, an amount not less than the approved appraisal of the fair market value of such property or the amount of the award of compensation in the condemnation proceeding of such property.

(5) The construction or development of a program or project (for which federal financial assistance will be available to pay all or any part of the cost of the program or project) shall be so scheduled that, to the greatest extent practicable, no person lawfully occupying real property shall be required to move from a dwelling (assuming a replacement dwelling will be available) or to move his business or farm operation without at least 90 days' written notice of the date by which such move is required.

(6) If an owner or tenant is permitted to occupy the real property acquired on a rental basis for a short term or for a period subject to termination by the acquiring agency on short notice, the amount of rent required shall not exceed the fair rental value of the property to a short-term occupier.

(7) In no event shall the time of condemnation be advanced or negotiations or condemnation and the deposit of funds in court for the use of the owner be deferred or any other action coercive in nature be taken to compel an agreement on the price to be paid for the property.

(8) If an interest in real property is to be acquired by exercise of the power of eminent domain, formal condemnation proceedings shall be instituted. The acquiring agency shall not intentionally make it necessary for an owner to institute legal proceedings to prove the fact of the taking of his real property.

(9) If the acquisition of only part of the property would leave its owner with an uneconomic remnant, an offer to acquire the entire property shall be made.

**History: En. Sec. 11, Ch. 3, 2nd Ex. L. 1971; R.C.M. 1947, 93-9937.**

**70-31-302. Reimbursement of closing costs and taxes incurred by owner.** Any agency acquiring real property for a program or project (for which federal financial assistance will be available to pay all or any part of the cost of the program or project) shall, as soon as practicable after the date of payment of the purchase price or the date of deposit into court of funds to satisfy the award of compensation in a condemnation proceeding to acquire real property, whichever is the earlier, reimburse the owner to the extent the acquiring agency deems fair and reasonable for:

(1) expenses he necessarily incurred for recording fees, transfer taxes, and similar expenses incidental to conveying such real property to the acquiring agency;

(2) penalty costs for prepayment for any preexisting recorded mortgage or deed of trust entered into in good faith encumbering such real property; and

(3) the pro rata portion of real property taxes paid which are allocable to a period subsequent to the date of vesting title in the acquiring agency or the effec-

tive date of possession of such real property by the acquiring agency, whichever is the earlier.

**History: En. Sec. 12, Ch. 3, 2nd Ex. L. 1971; R.C.M. 1947, 93-9938.**

**70-31-303. Inverse condemnation — reimbursement of expenses of proceeding.** Where an inverse condemnation proceeding is instituted by the owner of any right, title, or interest in real property because of the alleged taking of his property for any program or project (for which federal financial assistance will be available to pay all or any part of the cost of the program or project), the court rendering a judgment for the plaintiff in such proceeding and awarding compensation for the taking of property or attorney for the acquiring agency effecting a settlement of any such proceeding shall determine and award or allow to such plaintiff as a part of such judgment or settlement such sum as will, in the opinion of the court or such attorney, reimburse such plaintiff for his reasonable costs, disbursements, and expenses including reasonable attorney, appraisal, and engineering fees actually incurred because of such proceeding.

**History: En. Sec. 14, Ch. 3, 2nd Ex. L. 1971; R.C.M. 1947, 93-9940.**

**70-31-304. Reimbursement of costs when condemnation proceedings dismissed or abandoned.** Where a condemnation proceeding is instituted by an agency to acquire real property for a program or project (for which federal financial assistance is available) and the final judgment is that the real property cannot be acquired by condemnation or that the proceeding is abandoned, the owner of any right, title, or interest in such real property shall be paid such sum as will, in the opinion of the court, reimburse such owner for his reasonable attorney, appraisal, and engineering fees actually incurred because of the condemnation proceedings. The award of such sums will be paid by the agency which sought to condemn the property.

**History: En. Sec. 13, Ch. 3, 2nd Ex. L. 1971; R.C.M. 1947, 93-9939.**

**70-31-305. Acquisition of buildings and improvements affected.** (1) Where any interest in real property is acquired for a program or project (for which federal assistance will be available to pay all or any part of the cost of the program or project), the acquiring agency shall acquire an equal interest in all buildings, structures, or other improvements located upon the real property so acquired and which are required to be removed from such real property or which the acquiring agency determines will be adversely affected by the use to which such real property will be put.

(2) For the purpose of determining the just compensation to be paid for any building, structure, or other improvement required to be acquired by subsection (1) of this section, such building, structure, or other improvement shall be deemed to be a part of the real property to be acquired notwithstanding the right or obligation of a tenant, as against the owner of any other interest in the real property, to remove such building, structure, or improvement at the expiration of his term; and the fair market value which such building, structure, or improvement contributes to the fair market value of the real property to be acquired or the fair market value of such building, structure, or improvement for removal from the real property, whichever is the greater, shall be paid to the tenant therefor.

(3) Payment for such buildings, structures, or improvements as set forth in subsection (2) shall not result in duplication of any payments otherwise authorized by state law. No such payment shall be made unless the owner of the land involved disclaims all interest in the improvements of the tenant. In consideration for any such payment, the tenant shall assign, transfer, and release all his right, title, and interest in and to such improvements. Nothing in this subsection or subsection (2)

shall be construed to deprive the tenant of any rights to reject payment and to obtain payment for such property interests in accordance with other laws of the state.

**History: En. Sec. 15, Ch. 3, 2nd Ex. L. 1971; R.C.M. 1947, 93-9941.**

# CHAPTER 32

# HOMESTEADS

### Part 1 — Establishment of the Homestead

Section

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## Part 1

## Establishment of the Homestead

**70-32-101. Of what homestead consists.** The homestead consists of the dwelling house in which the claimant resides and the land on which the same is situated, selected as in this chapter provided.

**History: En. Sec. 1670, Civ. C. 1895; re-en. Sec. 4694, Rev. C. 1907; re-en. Sec. 6945, R.C.M. 1921; Cal. Civ. C. Sec. 1237; re-en. Sec. 6945, R.C.M. 1935; R.C.M. 1947, 33-101.**

**70-32-102. Head of family defined.** The phrase "head of a family" as used in this chapter includes within its meaning:

(1) the husband and wife acting together or either one of them if they do not join in the particular transaction. In any given transaction which requires action by the head of a family, the spouse who undertakes the transaction shall be deemed head of the family in regard to that particular transaction.

(2) every person who has attained the age of 60 years and who actually resides on the premises;

(3) every person who has residing on the premises with him or her and under his or her care and maintenance either:

(a) his or her minor child or the minor child of his or her wife or husband or former wife or husband;

(b) a minor grandchild, brother or sister, or minor child of a brother or sister;

(c) a father, mother, grandfather, or grandmother;

(d) the father, mother, grandfather, or grandmother of a husband or wife or former husband or wife;

(e) an unmarried sister, brother, or any other of the relatives mentioned in this section, who have attained the age of majority and are unable to take care of or support themselves.

**History: En. Sec. 1694, Civ. C. 1895; re-en. Sec. 4718, Rev. C. 1907; re-en. Sec. 6969, R.C.M. 1921; Cal. Civ. C. Sec. 1261; amd. Sec. 1, Ch. 86, L. 1925; re-en. Sec. 6969, R.C.M. 1935; amd. Sec. 3, Ch. 1, L. 1975; R.C.M. 1947, 33-125.**

**70-32-103. From whose property it may be selected.** If the claimant be married, the homestead may be selected from the property of either spouse. When the claimant is not married but is head of a family within the meaning of 70-32-102, the homestead may be selected from any of his or her property.

**History: En. Sec. 1671, Civ. C. 1895; re-en. Sec. 4695, Rev. C. 1907; re-en. Sec. 6946, R.C.M. 1921; Cal. Civ. C. Sec. 1238; re-en. Sec. 6946, R.C.M. 1935; amd. Sec. 1, Ch. 1, L. 1975; R.C.M. 1947, 33-102.**

**70-32-104. Limitations on quantity and value which may be selected.** (1) Homesteads may be selected and claimed:

(a) consisting of any quantity of land not exceeding 320 acres used for agricultural purposes and the dwelling house thereon and its appurtenances and not included in any town plot, city, or village; or

(b) a quantity of land not exceeding in amount one-fourth of an acre being within a town plot, city, or village and the dwelling house thereon and its appurtenances.

(2) Such homestead, in either case, shall not exceed in value the sum of $20,000. However, in any proceedings instituted to determine the value of such homestead, the assessed value of such land with included appurtenances, if any, and of such dwelling house as appears on the last completed assessment roll preceding the institution of such proceedings shall be prima facie evidence of the value of the property claimed as a homestead.

**History: En. Sec. 1693, Civ. C. 1895; re-en. Sec. 4717, Rev. C. 1907; re-en. Sec. 6968, R.C.M. 1921; Cal. Civ. C. Sec. 1260; amd. Sec. 1, Ch. 126, L. 1931; re-en. Sec. 6968, R.C.M. 1935; amd. Sec. 1, Ch. 166, L. 1937; amd. Sec. 1, Ch. 50, L. 1941; amd. Sec. 1, Ch. 266, L. 1965; amd. Sec. 1, Ch. 300, L. 1973; R.C.M. 1947, 33-124.**

**70-32-105. Mode of selection — declaration required.** In order to select a homestead, the head of a family must execute and acknowledge, in the same manner as a grant of real property is acknowledged, a declaration of homestead and file the same for record.

**History: En. Sec. 1700, Civ. C. 1895; re-en. Sec. 4719, Rev. C. 1907; re-en. Sec. 6970, R.C.M. 1921; Cal. Civ. C. Sec. 1262; re-en. Sec. 6970, R.C.M. 1935; amd. Sec. 4, Ch. 1, L. 1975; R.C.M. 1947, 33-126.**

**70-32-106. Contents of declaration.** The declaration of homestead must contain:

(1) a statement showing that the person making it is the head of a family. If both spouses join in the declaration, this fact shall be stated.

(2) a statement that the person making it is residing on the premises and claims them as a homestead;

(3) a description of the premises;

(4) an estimate of their actual cash value.

**History: En. Sec. 1701, Civ. C. 1895; re-en. Sec. 4720, Rev. C. 1907; re-en. Sec. 6971, R.C.M. 1921; Cal. Civ. C. Sec. 1263; re-en. Sec. 6971, R.C.M. 1935; amd. Sec. 5, Ch. 1, L. 1975; R.C.M. 1947, 33-127.**

**70-32-107. Declaration to be recorded.** The declaration must be recorded in the office of the county clerk of the county in which the land is situated.

**History: En. Sec. 1702, Civ. C. 1895; re-en. Sec. 4721, Rev. C. 1907; re-en. Sec. 6972, R.C.M. 1921; Cal. Civ. C. Sec. 1264; re-en. Sec. 6972, R.C.M. 1935; R.C.M. 1947, 33-128.**

## Part 2

## Homestead Exemption — Execution

**70-32-201. Homestead exempt from execution generally.** The homestead is exempt from execution or forced sale, except as in this chapter provided.

**History: En. Sec. 1673, Civ. C. 1895; re-en. Sec. 4697, Rev. C. 1907; re-en. Sec. 6948, R.C.M. 1921; Cal. Civ. C. Sec. 1240; re-en. Sec. 6948, R.C.M. 1935; R.C.M. 1947, 33-104.**

**70-32-202. Execution allowed under certain judgments.** The homestead is subject to execution or forced sale in satisfaction of judgments obtained:

(1) before the declaration of homestead was filed for record and which constitute liens upon the premises;

(2) on debts secured by mechanics' or vendors' liens upon the premises;

(3) on debts secured by mortgages on the premises, executed and acknowledged by the husband and wife or by an unmarried claimant;

(4) on debts secured by mortgages on the premises, executed and recorded before the declaration of homestead was filed for record.

**History: En. Sec. 1674, Civ. C. 1895; re-en. Sec. 4698, Rev. C. 1907; re-en. Sec. 6949, R.C.M. 1921; Cal. Civ. C. Sec. 1241; re-en. Sec. 6949, R.C.M. 1935; R.C.M. 1947, 33-105(part).**

**70-32-203. Execution under judgments not enumerated — application required.** When an execution for the enforcement of a judgment obtained in a case not within the classes enumerated in 70-32-202 is levied upon the homestead, the judgment creditor may apply to the district court of the county in which the homestead is situated or a judge thereof for the appointment of persons to appraise the value thereof.

**History: En. Sec. 1678, Civ. C. 1895; re-en. Sec. 4702, Rev. C. 1907; re-en. Sec. 6953, R.C.M. 1921; Cal. Civ. C. Sec. 1245; re-en. Sec. 6953, R.C.M. 1935; R.C.M. 1947, 33-109.**

**70-32-204. Application for appraisal — contents — filing.** (1) The application must be made upon a verified petition showing:

(a) the fact that an execution has been levied upon the homestead;
(b) the name of the claimant;
(c) that the value of the homestead exceeds the amount of the homestead exemption.
(2) The petition must be filed with the clerk of the district court.

**History: En. Secs. 1679, 1680, Civ. C. 1895; re-en. Secs. 4703, 4704, Rev. C. 1907; re-en. Secs. 6954, 6955, R.C.M. 1921; Cal. Civ. C. Secs. 1246, 1247; re-en. Secs. 6954, 6955, R.C.M. 1935; R.C.M. 1947, 33-110, 33-111.**

**70-32-205. Service of petition — notice of hearing.** A copy of the petition, with a notice of the time and place of hearing, must be served upon the claimant at least 2 days before the hearing.

**History: En. Sec. 1681, Civ. C. 1895; re-en. Sec. 4705, Rev. C. 1907; re-en. Sec. 6956, R.C.M. 1921; Cal. Civ. C. Sec. 1248; re-en. Sec. 6956, R.C.M. 1935; R.C.M. 1947, 33-112.**

**70-32-206. Appointment of appraisers — oath.** (1) At the hearing the judge may, upon proof of the service of a copy of the petition and notice and of the facts stated in the petition, appoint three disinterested residents and freeholders of the county to appraise the value of the homestead.
(2) The persons appointed, before entering upon the performance of their duties, must take an oath to faithfully perform the same.

**History: En. Secs. 1682, 1683, Civ. C. 1895; re-en. Secs. 4706, 4707, Rev. C. 1907; re-en. Secs. 6957, 6958, R.C.M. 1921; Cal. Civ. C. Secs. 1249, 1250; re-en. Secs. 6957, 6958, R.C.M. 1935; R.C.M. 1947, 33-113, 33-114.**

**70-32-207. Duty of appraisers.** They must view the premises and appraise the value thereof, and if the appraised value exceeds the homestead exemption, they must determine whether the land claimed can be divided without material injury.

**History: En. Sec. 1684, Civ. C. 1895; re-en. Sec. 4708, Rev. C. 1907; re-en. Sec. 6959, R.C.M. 1921; Cal. Civ. C. Sec. 1251; re-en. Sec. 6959, R.C.M. 1935; R.C.M. 1947, 33-115.**

**70-32-208. Report of appraisers — contents.** Within 15 days after their appointment they must make to the judge a report in writing, which report must show the appraised value and their determination upon the matter of a division of the land claimed.

**History: En. Sec. 1685, Civ. C. 1895; re-en. Sec. 4709, Rev. C. 1907; re-en. Sec. 6960, R.C.M. 1921; Cal. Civ. C. Sec. 1252; re-en. Sec. 6960, R.C.M. 1935; R.C.M. 1947, 33-116.**

**70-32-209. Order dividing land — execution against remainder over exemption.** If from the report it appears to the judge that the land claimed can be divided without material injury, he must by an order direct the appraisers to set off to the claimant so much of the land, including the residence, as will amount in value to the homestead exemption, and the execution may be enforced against the remainder of the land.

**History: En. Sec. 1686, Civ. C. 1895; re-en. Sec. 4710, Rev. C. 1907; re-en. Sec. 6961, R.C.M. 1921; Cal. Civ. C. Sec. 1253; re-en. Sec. 6961, R.C.M. 1935; R.C.M. 1947, 33-117.**

**70-32-210. Sale when land cannot be divided.** If from the report it appears to the judge that the land claimed exceeds in value the amount of the homestead exemption and that it cannot be divided, he must make an order directing its sale under execution.

**History: En. Sec. 1687, Civ. C. 1895; re-en. Sec. 4711, Rev. C. 1907; re-en. Sec. 6962, R.C.M. 1921; Cal. Civ. C. Sec. 1254; re-en. Sec. 6962, R.C.M. 1935; R.C.M. 1947, 33-118.**

**70-32-211. Amount of bid.** At such sale no bid must be received unless it exceeds the amount of the homestead exemption.

**History: En. Sec. 1688, Civ. C. 1895; re-en. Sec. 4712, Rev. C. 1907; re-en. Sec. 6963, R.C.M. 1921; Cal. Civ. C. Sec. 1255; re-en. Sec. 6963, R.C.M. 1935; R.C.M. 1947, 33-119.**

**70-32-212. Application of proceeds of sale.** If the sale is made, the proceeds thereof, to the amount of the homestead exemption, must be paid to the claimant and the balance applied to the satisfaction of the execution.

**History: En. Sec. 1689, Civ. C. 1895; re-en. Sec. 4713, Rev. C. 1907; re-en. Sec. 6964, R.C.M. 1921; Cal. Civ. C. Sec. 1256; re-en. Sec. 6964, R.C.M. 1935; R.C.M. 1947, 33-120.**

**70-32-213. Sale proceeds equal to exemption protected.** The money paid to the claimant is entitled, for the period of 6 months thereafter, to the same protection against legal process and the voluntary disposition of either spouse which the law gives to the homestead.

**History: En. Sec. 1690, Civ. C. 1895; re-en. Sec. 4714, Rev. C. 1907; re-en. Sec. 6965, R.C.M. 1921; Cal. Civ. C. Sec. 1257; re-en. Sec. 6965, R.C.M. 1935; amd. Sec. 2, Ch. 1, L. 1975; R.C.M. 1947, 33-121.**

**70-32-214. Compensation of appraisers.** The court must fix the compensation of the appraisers, not to exceed $3 per day each for the time actually engaged.

**History: En. Sec. 1691, Civ. C. 1895; re-en. Sec. 4715, Rev. C. 1907; re-en. Sec. 6966, R.C.M. 1921; Cal. Civ. C. Sec. 1258; re-en. Sec. 6966, R.C.M. 1935; R.C.M. 1947, 33-122.**

**70-32-215. Costs.** The execution creditor must pay the costs of these proceedings in the first instance, but in the cases provided for in 70-32-209 and 70-32-210, the amount so paid must be added as costs on execution and collected accordingly.

**History: En. Sec. 1692, Civ. C. 1895; re-en. Sec. 4716, Rev. C. 1907; re-en. Sec. 6967, R.C.M. 1921; Cal. Civ. C. Sec. 1259; re-en. Sec. 6967, R.C.M. 1935; R.C.M. 1947, 33-123.**

## Part 3

## Conveyance, Encumbrance, and Abandonment of Homestead

**70-32-301. How conveyed or encumbered — instrument.** The homestead of a married person cannot be conveyed or encumbered unless the instrument by which it is conveyed or encumbered is executed and acknowledged by both husband and wife.

**History: En. Sec. 1675, Civ. C. 1895; re-en. Sec. 4699, Rev. C. 1907; re-en. Sec. 6950, R.C.M. 1921; Cal. Civ. C. Sec. 1242; re-en. Sec. 6950, R.C.M. 1935; R.C.M. 1947, 33-106.**

**70-32-302. How abandoned — declaration.** A homestead can be abandoned only by a declaration of abandonment or a grant thereof executed and acknowledged by:

(1) the husband and wife if the claimant is married;
(2) the claimant if unmarried.

**History: En. Sec. 1676, Civ. C. 1895; re-en. Sec. 4700, Rev. C. 1907; re-en. Sec. 6951, R.C.M. 1921; Cal. Civ. C. Sec. 1243; re-en. Sec. 6951, R.C.M. 1935; R.C.M. 1947, 33-107.**

**70-32-303. When declaration effective.** A declaration of abandonment is effectual only from the time it is filed in the office in which the homestead was recorded.

**History: En. Sec. 1677, Civ. C. 1895; re-en. Sec. 4701, Rev. C. 1907; re-en. Sec. 6952, R.C.M. 1921; Cal. Civ. C. Sec. 1244; re-en. Sec. 6952, R.C.M. 1935; R.C.M. 1947, 33-108.**

# TITLE 71

## MORTGAGES, PLEDGES, AND LIENS

Ch.
1. Mortgages.
2. Pledges.
3. Liens.

## CHAPTER 1

## MORTGAGES

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## Part 1

## General Provisions

**71-1-101. Definition.** "Mortgage" is a contract by which specific property is hypothecated for the performance of an act, without the necessity of a change of possession.

**History: En. Sec. 3810, Civ. C. 1895; re-en. Sec. 5731, Rev. C. 1907; re-en. Sec. 8246, R.C.M. 1921; Cal. Civ. C. Sec. 2920; Field Civ. C. Sec. 1608; re-en. Sec. 8246, R.C.M. 1935; R.C.M. 1947, 52-101.**

**71-1-102. Power of attorney to execute.** A power of attorney to execute a mortgage must be in writing, subscribed, acknowledged or proved, certified, and recorded in like manner as powers of attorney for grants of real property.

**History: En. Sec. 3822, Civ. C. 1895; re-en. Sec. 5743, Rev. C. 1907; re-en. Sec. 8258, R.C.M. 1921; Cal. Civ. C. Sec. 2933; re-en. Sec. 8258, R.C.M. 1935; R.C.M. 1947, 52-113.**

**71-1-103. Mortgage a special lien — on what a lien.** (1) The lien of a mortgage is special, unless otherwise expressly agreed, and is independent of possession.

(2) A mortgage is a lien upon everything that would pass by a grant of the property.

**History: (1)En. Sec. 3812, Civ. C. 1895; re-en. Sec. 5733, Rev. C. 1907; re-en. Sec. 8248, R.C.M. 1921; Cal. Civ. C. Sec. 2923; Field Civ. C. Sec. 1609; re-en. Sec. 8248, R.C.M. 1935; Sec. 52-103, R.C.M. 1947; (2)En. Sec. 3815, Civ. C. 1895; re-en.**

**Sec. 5736, Rev. C. 1907; re-en. Sec. 8251, R.C.M. 1921; Cal. Civ. C. Sec. 2926; Based on Field Civ. C. Sec. 1617; re-en. Sec. 8251, R.C.M. 1935; Sec. 52-106, R.C.M. 1947; R.C.M. 1947, 52-103, 52-106.**

**71-1-104. Mortgage not a personal obligation.** A mortgage does not bind the mortgagor personally to perform the act for the performance of which it is a security unless there is an express covenant therein to that effect.

**History: En. Sec. 3817, Civ. C. 1895; re-en. Sec. 5738, Rev. C. 1907; re-en. Sec. 8253, R.C.M. 1921; Cal. Civ. C. Sec. 2928; re-en. Sec. 8253, R.C.M. 1935; R.C.M. 1947, 52-108.**

**71-1-105. Mortgagee not entitled to possession.** A mortgage does not entitle the mortgagee to the possession of the property unless authorized by the express terms of the mortgage, but after the execution of the mortgage, the mortgagor may agree to such change of possession without a new consideration.

**History: En. Sec. 3816, Civ. C. 1895; re-en. Sec. 5737, Rev. C. 1907; re-en. Sec. 8252, R.C.M. 1921; Cal. Civ. C. Sec. 2927; Based on Field Civ. C. Sec. 1620; re-en. Sec. 8252, R.C.M. 1935; R.C.M. 1947, 52-107.**

**71-1-106. Waste prohibited.** No person whose interest is subject to the lien of a mortgage may do any act which will substantially impair the mortgagee's security.

**History: En. Sec. 3818, Civ. C. 1895; re-en. Sec. 5739, Rev. C. 1907; re-en. Sec. 8254, R.C.M. 1921; Cal. Civ. C. Sec. 2929; re-en. Sec. 8254, R.C.M. 1935; R.C.M. 1947, 52-109.**

**71-1-107. Transfers of interest.** (1) Every transfer of an interest in property, other than in trust, made only as a security for the performance of another act is to be deemed a mortgage, except when in the case of personal property it is accompanied by actual change of possession, in which case it is deemed a pledge.

(2) The fact that a transfer was made subject to defeasance on a condition may, for the purpose of showing such transfer to be a mortgage, be proved (except as against a subsequent purchaser or encumbrancer for value and without notice), though the fact does not appear by the terms of the instrument.

**History: (1)En. Sec. 3813, Civ. C. 1895; re-en. Sec. 5734, Rev. C. 1907; re-en. Sec. 8249, R.C.M. 1921; Cal. Civ. C. Sec. 2924; Based on Field Civ. C. Sec. 1610; re-en. Sec. 8249, R.C.M. 1935; Sec. 52-104, R.C.M. 1947; (2)En. Sec. 3814, Civ. C. 1895; re-en. Sec. 5735, Rev. C. 1907; re-en. Sec. 8250, R.C.M. 1921; Cal. Civ. C. Sec. 2925; Field Civ. C. Sec. 1612; re-en. Sec. 8250, R.C.M. 1935; Sec. 52-105, R.C.M. 1947; R.C.M. 1947, 52-104, 52-105.**

**71-1-108. Subsequently acquired title.** Title acquired by the mortgagor subsequent to the execution of the mortgage inures to the mortgagee as security for the debt in like manner as if acquired before the execution.

**History: En. Sec. 3819, Civ. C. 1895; re-en. Sec. 5740, Rev. C. 1907; re-en. Sec. 8255, R.C.M. 1921; Cal. Civ. C. Sec. 2930; re-en. Sec. 8255, R.C.M. 1935; R.C.M. 1947, 52-110.**

**71-1-109. Mortgage of property adversely held.** A mortgage may be created upon property held adversely to the mortgagor.

**History: En. Sec. 3811, Civ. C. 1895; re-en. Sec. 5732, Rev. C. 1907; re-en. Sec. 8247, R.C.M. 1921; Cal. Civ. C. Sec. 2921; Field Civ. C. Sec. 1614; re-en. Sec. 8247, R.C.M. 1935; R.C.M. 1947, 52-102.**

**71-1-110. Passage of mortgage by assignment of debt.** The assignment of a debt secured by mortgage carries with it the security.

**History: En. Sec. 3825, Civ. C. 1895; re-en. Sec. 5746, Rev. C. 1907; re-en. Sec. 8261, R.C.M. 1921; Cal. Civ. C. Sec. 2936; re-en. Sec. 8261, R.C.M. 1935; R.C.M. 1947, 52-115.**

**71-1-111. Power of sale.** A power of sale may be conferred by a mortgage upon the mortgagee or any other person, to be exercised after a breach of the obligation for which the mortgage is a security.

**History: En. Sec. 3821, Civ. C. 1895; re-en. Sec. 5742, Rev. C. 1907; re-en. Sec. 8257, R.C.M. 1921; Cal. Civ. C. Sec. 2932; Field Civ. C. Sec. 1615; re-en. Sec. 8257, R.C.M. 1935; R.C.M. 1947, 52-112.**

**71-1-112. Applicable laws.** (1) In the event of conflict between any provision of this part and the Uniform Commercial Code, the latter shall govern.

(2) All mortgages and deeds of trust covering both real and personal property executed by a corporation, association, or partnership or by an individual or individuals are governed by the law relating to mortgages or deeds of trust of real property so far as the real property is concerned and by the Uniform Commercial Code—Secured Transactions so far as the personal property is concerned.

**History: (1)En. 52-117 by Sec. 11-133, Ch. 264, L. 1963; Sec. 52-117, R.C.M. 1947; (2)En. Sec. 3849, Civ. C. 1895; re-en. Sec. 5756, Rev. C. 1907; amd. Sec. 1, Ch. 72, L. 1921; amd. Sec. 1, Ch. 39, L. 1927; amd. Sec. 1, Ch. 11, L. 1931; re-en. Sec. 8273, R.C.M. 1935; amd. Sec. 11-134, Ch. 264, L. 1963; Sec. 52-212, R.C.M. 1947; R.C.M. 1947, 52-117, 52-212.**

## Part 2

## Mortgages of Real Property

**71-1-201. What real property may be mortgaged — debts secured.** Any interest in real property which is capable of being transferred may be mortgaged. Such property or interest may be mortgaged to secure existing debts, to secure debts created simultaneously with the execution of the mortgage, and to secure advances then in contemplation but to be made in the future.

**History: En. Sec. 3840, Civ. C. 1895; re-en. Sec. 5747, Rev. C. 1907; re-en. Sec. 8262, R.C.M. 1921; Cal. Civ. C. Sec. 2947; re-en. Sec. 8262, R.C.M. 1935; amd. Sec. 1, Ch. 150, L. 1949; R.C.M. 1947, 52-201(part).**

**71-1-202. Mortgage not considered conveyance — recovery of possession.** A mortgage of real property shall not be deemed a conveyance, whatever its terms, so as to enable the owner of the mortgage to recover possession of the real property without a foreclosure and sale. When the mortgage confers a power of sale, as mentioned in 71-1-111, possession may be recovered according to the terms of the mortgage.

**History: En. Sec. 239, p. 93, Bannack Stat.; re-en. Sec. 260, p. 188, L. 1867; re-en. Sec. 309, p. 95, Cod. Stat. 1871; re-en. Sec. 359, p. 139, L. 1877; re-en. Sec. 359, 1st Div. Rev. Stat. 1879; re-en. Sec. 371, 1st Div. Comp. Stat. 1887; amd. Sec. 1316, C. Civ. Proc. 1895; re-en. Sec. 6877, Rev. C. 1907; re-en. Sec. 9495, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 744; re-en. Sec. 9495, R.C.M. 1935; R.C.M. 1947, 93-6219.**

**71-1-203. Writing required.** A mortgage of real property can be created, renewed, or extended only by writing, with the formalities required in the case of a grant of real property.

**History: En. Sec. 3842, Civ. C. 1895; re-en. Sec. 5749, Rev. C. 1907; re-en. Sec. 8264, R.C.M. 1921; Cal. Civ. C. Sec. 2922; Field Civ. C. Sec. 1623; re-en. Sec. re-en. Sec. 8264, R.C.M. 1935; R.C.M. 1947, 52-203.**

**71-1-204. Form of mortgage.** A mortgage of real property may be made in substantially the following form:

"This mortgage, made the .... day of ...., in the year ...., by A.B., of ...., mortgagor, to C.D., of ...., mortgagee, witnesseth:

That the mortgagor mortgages to the mortgagee (here describe the property), as security for the payment to him of .... dollars, on (or before) the .... day of ...., in the year ...., with interest thereon (or as security for the payment of an obligation, describing it, etc.). A.B."

**History: En. Sec. 3841, Civ. C. 1895; re-en. Sec. 5748, Rev. C. 1907; re-en. Sec. 8263, R.C.M. 1921; Cal. Civ. C. Sec. 2948; re-en. Sec. 8263, R.C.M. 1935; R.C.M. 1947, 52-202.**

**71-1-205. Priorities.** Any lien entitled to actual priority over the lien of mortgage by force of any express provision of the laws of this state shall continue to have priority to the extent prescribed by law.

**History: En. Sec. 3840, Civ. C. 1895; re-en. Sec. 5747, Rev. C. 1907; re-en. Sec. 8262, R.C.M. 1921; Cal. Civ. C. Sec. 2947; re-en. Sec. 8262, R.C.M. 1935; amd. Sec. 1, Ch. 150, L. 1949; R.C.M. 1947, 52-201(part).**

**71-1-206. Future advances.** (1) The total amount of all future advances contemplated and to be subject to mortgage protection must be stated in the mortgage, provided the mortgagee may reserve the right, at the mortgagee's option, to refuse to make all or any part thereof.

(2) The lien for said stated amount of said future advances shall have priority to the same extent as if the amount thereof had been actually advanced by the mortgagee to the mortgagor at the time of the execution of the mortgage.

(3) The mortgagee shall, upon demand of the mortgagor or a creditor, furnish a statement of all such advances and amounts paid on the principal sum secured, provided such statement shall not impair or affect the lien created for all advances. Upon receipt of such statement or at any other time following the execution and delivery of the mortgage, the mortgagor may deliver written notice, duly acknowledged, to the mortgagee plainly stating that the mortgagor does not desire to request or apply for any future advances if none have been allowed or for any further advances if additional advances have in fact been theretofore allowed under the mortgage, clearly identifying the mortgage by reference to its date, the parties thereto, and the principal amount of the original indebtedness and the limit placed on contemplated future advances, if allowed. Upon the recording of such written notice by the mortgagor in the county and counties where the mortgage is recorded, the lien of the mortgage shall continue to have priority, but only for the aggregate amount of the indebtedness then existing, including any advances theretofore made, interest due, and other charges as evidenced by the original loan-contract and indebtedness thereafter accumulating on such basis, exclusive of any other future advances originally contemplated.

**History: En. Sec. 3840, Civ. C. 1895; re-en. Sec. 5747, Rev. C. 1907; re-en. Sec. 8262, R.C.M. 1921; Cal. Civ. C. Sec. 2947; re-en. Sec. 8262, R.C.M. 1935; amd. Sec. 1, Ch. 150, L. 1949; R.C.M. 1947, 52-201(part).**

**71-1-207. Recording of mortgages and assignments.** (1) Mortgages of real property may be acknowledged or proved, certified, and recorded in like manner and with like effect as grants thereof.

(2) An assignment of a real estate mortgage may be recorded in like manner as a real estate mortgage and the record thereof shall operate as due and legal notice to the mortgagor and all persons subsequently deriving title to the mortgage from the assignor as well as to all other persons, including subsequent purchasers, encumbrancers, mortgagees, or other lien holders. Any such assignment shall contain the assignee's post-office address at his place of residence and shall not be entitled to be recorded or filed unless it contains such post-office address.

**History: (1)En. Sec. 3844, Civ. C. 1895; re-en. Sec. 5751, Rev. C. 1907; re-en. Sec. 8266, R.C.M. 1921; Cal. Civ. C. Sec. 2952; re-en. Sec. 8266, R.C.M. 1935; Sec. 52-205, R.C.M. 1947; (2)En. Sec. 3823, Civ. C. 1895; re-en. Sec. 5744, Rev. C. 1907; re-en. Sec. 8259, R.C.M. 1921; Cal. Civ. C. Sec. 2934; amd. Sec. 1, Ch. 14, L. 1925; amd. Sec. 1, Ch. 159, L. 1935; re-en. Sec. 8259, R.C.M. 1935; amd. Sec. 11-131, Ch. 264, L. 1963; Sec. 52-114, R.C.M. 1947; R.C.M. 1947, 52-114, 52-205.**

**71-1-208. Recording of subordination or waiver agreements.** A subordination agreement or a waiver in favor of subsequent purchasers, encumbrancers, or mortgagees as regards any real estate mortgage of record or the property therein included may be recorded in like manner as a real estate mortgage, and such record shall operate as due and legal notice to the mortgagor and the mortgagee and to all other interested persons. Any such subordination agreement or waiver shall be valid and binding so far as the mortgage therein referred to or the property covered by such mortgage is concerned, when executed by the record holder of the mortgage involved.

**History: En. Sec. 1, Ch. 126, L. 1937; amd. Sec. 11-132, Ch. 264, L. 1963; R.C.M. 1947, 52-116.**

**71-1-209. Recording defeasance necessary to affect grant.** When a grant of real property purports to be an absolute conveyance but is intended to be defeasible on the performance of certain conditions, such grant is not defeated or affected as against any person other than the grantee or his heirs or devisees or persons having actual notice unless an instrument of defeasance, duly executed and acknowledged, shall have been recorded in the office of the county clerk of the county where the property is situated.

**History: En. Sec. 3843, Civ. C. 1895; re-en. Sec. 5750, Rev. C. 1907; re-en. Sec. 8265, R.C.M. 1921; Cal. Civ. C. Sec. 2950; re-en. Sec. 8265, R.C.M. 1935; R.C.M. 1947, 52-204.**

**71-1-210. Period of mortgage — renewal.** Every mortgage of real property made, acknowledged, and recorded as provided by the laws of this state shall be good as against all from the time it is so recorded until 8 years after the maturity of the entire debt or obligation secured thereby and no longer, unless the mortgagee, his heirs, executors, administrators, representatives, or assigns shall, within 60 days after the expiration of said 8 years, file in the office of the county clerk where said mortgage is recorded an affidavit setting forth the date of said mortgage, when and where recorded, the amount of the debt secured thereby, and the amount remaining unpaid and that the mortgage is not renewed for the purpose of hindering, delaying, or defrauding creditors of the mortgagor or owner of the land, and upon the filing of said affidavit, the mortgage shall be valid against all persons for a further period of 8 years.

**History: En. Sec. 1, Ch. 27, L. 1913; re-en. Sec. 8267, R.C.M. 1921; amd. Sec. 1, Ch. 104, L. 1933; re-en. Sec. 8267, R.C.M. 1935; R.C.M. 1947, 52-206.**

**71-1-211. Satisfaction of mortgage — record thereof.** (1) Any mortgage that has been or may be hereafter recorded may be discharged by an entry in the margin of the record thereof, signed by the mortgagee or his personal representative or assignee, acknowledging the satisfaction of the mortgage, in the presence of the county clerk or his deputy who shall subscribe the same as a witness. Such entry shall have the same effect as a deed of release duly acknowledged and recorded.

(2) Any mortgage shall also be discharged upon the record thereof by the county clerk in whose custody it shall be whenever there shall be presented to him a certificate executed by the mortgagee, his personal representative or assignee, acknowledged or proved and certified as in this code prescribed to entitle a conveyance to be recorded, specifying that such mortgage has been paid or otherwise satisfied or discharged.

(3) Every such certificate and the proof and acknowledgment thereof shall be recorded at full length, and a reference shall be made to the book containing such record in the minutes of the discharge of such mortgage made by the county clerk upon the margin of the record thereof.

**History: (1)En. Sec. 36, p. 485, Bannack Stat.; re-en. Sec. 36, p. 402, Cod. Stat. 1871; re-en. Sec. 213, 5th Div. Rev. Stat. 1879; re-en. Sec. 271, 5th Div. Comp. Stat. 1887; re-en. Sec. 3845, Civ. C. 1895; re-en. Sec. 5752, Rev. C. 1907; re-en. Sec. 8268, R.C.M. 1921; Cal. Civ. C. Sec. 2938; re-en. Sec. 8268, R.C.M. 1935; Sec. 52-207, R.C.M. 1947; (2)En. Sec. 37, p. 485, Bannack Stat.; re-en. Sec. 37, p. 402, Cod. Stat. 1871; re-en. Sec. 214, 5th Div. Rev. Stat. 1879; re-en. Sec. 272, 5th Div. Comp. Stat. 1887; re-en. Sec. 3846, Civ. C. 1895; re-en. Sec. 5753, Rev. C. 1907; re-en. Sec. 8269, R.C.M. 1921; Cal. Civ. C. Sec. 2939; re-en. Sec. 8269, R.C.M. 1935; Sec. 52-208, R.C.M. 1947; (3)En. Sec. 38, p. 485, Bannack Stat.; re-en. Sec. 38, p. 402, Cod. Stat. 1871; re-en. Sec. 215, 5th Div. Rev. Stat. 1879; re-en. Sec. 273, 5th Div. Comp. Stat. 1887; re-en. Sec. 3847, Civ. C. 1895; re-en. Sec. 5754, Rev. C. 1907; re-en. Sec. 8270, R.C.M. 1921; Cal. Civ. C. Sec. 2940; re-en. Sec. 8270, R.C.M. 1935; Sec. 52-209, R.C.M. 1947; R.C.M. 1947, 52-207, 52-208, 52-209.**

**71-1-212. Penalties for failure to give certificate of discharge or release after full performance.** Any mortgagee or his personal representative or assignee, as the case may be, after the full performance of the conditions of the mortgage, whether before or after a breach thereof, who shall for the space of 30 days after being requested refuse or neglect to execute, acknowledge, and deliver to the mortgagor a certificate of discharge or release thereof shall be liable to the mortgagor, his heirs, or assigns in the sum of $100 and also for all actual damages occasioned by such neglect or refusal.

**History: En. Sec. 39, p. 486, Bannack Stat.; re-en. Sec. 39, p. 402, Cod. Stat. 1871; re-en. Sec. 216, 5th Div. Rev. Stat. 1879; re-en. Sec. 274, 5th Div. Comp. Stat. 1887; re-en. Sec. 3748, Civ. C. 1895; re-en. Sec. 5755, Rev. C. 1907; amd. Sec. 1, Ch. 173, L. 1921; re-en. Sec. 8271, R.C.M. 1921; Cal. Civ. C. Sec. 2941; re-en. Sec. 8271, R.C.M. 1935; R.C.M. 1947, 52-210(part).**

**71-1-213. Discharge or release by other than mortgagee.** (1) When such discharge or release is made by the personal representative of the mortgagee, it shall be accompanied by a certified copy of his authority, unless such authority is already of record in the office of the county clerk and recorder where such mortgage is recorded.

(2) In case such discharge or release is made by an assignee, it must be accompanied by the assignment of such mortgage, unless such assignment is already of record in the office of the county clerk and recorder where such mortgage is recorded.

(3) In the event that such discharge or release is executed by an attorney in fact, such discharge or release shall have attached to it the power of attorney under

which it is made, unless such power of attorney is already of record in the office of the county clerk and recorder where such mortgage is recorded.

(4) When such discharge or release is executed by the heir or heirs of the mortgagee, such discharge or release must be accompanied by a certified copy of an order or decree of the court of competent jurisdiction showing such authority, unless such order or decree is already of record in the office of the county clerk and recorder where such mortgage is recorded.

(5) Foreign administrators and executors may satisfy mortgages of record in Montana, provided that the satisfaction of mortgages be accompanied by an authenticated copy of their letters of administration or letters testamentary, with the certificate of the clerk of the court in which the appointment was made that the same have not been revoked and are in full force, which certificate and certified copy of letters shall be presented and recorded in connection with the satisfaction of the mortgage. When so presented and recorded, they shall have the same force and effect as if the mortgage was satisfied by the mortgagee.

**History: En. Sec. 39, p. 486, Bannack Stat.; re-en. Sec. 39, p. 402, Cod. Stat. 1871; re-en. Sec. 216, 5th Div. Rev. Stat. 1879; re-en. Sec. 274, 5th Div. Comp. Stat. 1887; re-en. Sec. 3748, Civ. C. 1895; re-en. Sec. 5755, Rev. C. 1907; amd. Sec. 1, Ch. 173, L. 1921; re-en. Sec. 8271, R.C.M. 1921; Cal. Civ. C. Sec. 2941; re-en. Sec. 8271, R.C.M. 1935; R.C.M. 1947, 52-210(part).**

**71-1-214 through 71-1-220 reserved.**

**71-1-221. Definition of foreclosure.** The term "foreclosure" for the purpose of this part shall include sale or possession of real property made or taken whether by judicial proceedings or otherwise.

**History: En. Sec. 2, Ch. 2, L. 1935; re-en. Sec. 9473.2, R.C.M. 1935; R.C.M. 1947, 93-6009.**

**71-1-222. Proceedings in foreclosure suits.** (1) There is but one action for the recovery of debt or the enforcement of any right secured by mortgage upon real estate, which action must be in accordance with the provisions of this part. In such action the court may, by its judgment, direct:

(a) a sale of the encumbered property (or so much thereof as may be necessary);

(b) the application of the proceeds of the sale; and

(c) the payment of the costs of the court, the expenses of the sale, and the amount due the plaintiff.

(2) If it appears from the sheriff's return that the proceeds are insufficient and a balance still remains due, judgment can then be docketed for such balance against the defendant or defendants personally liable for the debt, and it becomes a lien upon the real estate of such judgment debtor, as in other cases on which execution may be issued.

(3) No person holding a conveyance from or under the mortgagor of the property mortgaged or having a lien thereon, which conveyance or lien does not appear of record in the proper office at the time of the commencement of the action, need be made a party to such action. The judgment therein rendered and the proceedings therein had are as conclusive against the party holding such unrecorded conveyance or lien as if he had been made a party to the action.

**History: En. Sec. 223, p. 90, Bannack Stat.; en. Sec. 246, p. 185, L. 1867; re-en. Sec. 295, p. 92, Cod. Stat. 1871; re-en. Sec. 346, p. 135, L. 1877; re-en. Sec. 346, 1st Div. Rev. Stat. 1879; re-en. Sec. 358, 1st Div. Comp. Stat. 1887; amd. Sec. 1290, C. Civ. Proc. 1895; re-en. Sec. 6861, Rev. C. 1907; re-en. Sec. 9467, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 726; re-en. Sec. 9467, R.C.M. 1935; amd. Sec. 11-166, Ch. 264, L. 1963; R.C.M. 1947, 93-6001.**

**71-1-223. Power of sale.** When a real estate mortgage confers a power of sale, either upon the mortgagee or any other person, to be executed after a breach of the obligation for which the mortgage is a security, either an action may be maintained under this part to foreclose or proceedings may be had under the provisions of the mortgage.

**History: En. Sec. 1293, C. Civ. Proc. 1895; re-en. Sec. 6864, Rev. C. 1907; re-en. Sec. 9470, R.C.M. 1921; re-en. Sec. 9470, R.C.M. 1935; amd. Sec. 11-167, Ch. 264, L. 1963; R.C.M. 1947, 93-6004.**

**71-1-224. Sale — notice.** Real estate sold under a power of sale given and contained in a mortgage of real estate, except in a trust indenture as defined in the "Small Tract Financing Act of Montana", shall be advertised for sale at least 30 days before the date fixed for such sale, in a newspaper in the county in which such real estate is situated, and in case there is no newspaper printed and published in said county, then by posting notices in at least five conspicuous places in said county, one of which notices must be posted on the land so advertised for sale. Two other notices must be posted in conspicuous places in the township in which said land is situated, one in such conspicuous place in said county as will be most likely to give notice to all persons interested in said sale, and one of said notices must be posted in a conspicuous place at the front door of the county courthouse of the county in which said land is located, and in addition to the publication or posting, as hereinbefore provided, notices of such sale must be served personally at least 30 days before the date fixed for such sale upon the occupant of the property so advertised for sale and upon the mortgagor if within the state of Montana and upon every person or persons having or claiming an interest of record in the real estate so advertised for sale who may be found within the state of Montana.

**History: En. Sec. 1, Ch. 165, L. 1917; re-en. Sec. 9471, R.C.M. 1921; re-en. Sec. 9471, R.C.M. 1935; amd. Sec. 18, Ch. 177, L. 1963; R.C.M. 1947, 93-6005.**

**71-1-225. Surplus money from sale.** If there be surplus money remaining after the payment of the amount due on the mortgage, lien, or encumbrance, with costs, the court may cause the same to be paid to the person entitled to it and in the meantime may direct it to be deposited in court.

**History: En. Sec. 247, p. 186, L. 1867; re-en. Sec. 296, p. 92, Cod. Stat. 1871; re-en. Sec. 347, p. 136, L. 1877; re-en. Sec. 347, 1st Div. Rev. Stat. 1879; re-en. Sec. 359, 1st Div. Comp. Stat. 1887; re-en. Sec. 1291, C. Civ. Proc. 1895; re-en. Sec. 6862, Rev. C. 1907; re-en. Sec. 9468, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 727; re-en. Sec. 9468, R.C.M. 1935; R.C.M. 1947, 93-6002.**

**71-1-226. Proceedings when debt secured falls due at different times.** If the debt for which the mortgage, lien, or encumbrance is held is not all due, as soon as sufficient of the property has been sold to pay the amount due, with costs, the sale must cease; and afterward, as often as more becomes due, for principal or interest, the court may, on motion, order more to be sold. But if the property cannot be sold in portions without injury to the parties, the whole may be ordered to be sold in the first instance and the entire debt and costs paid, there being a rebate of interest where such rebate is proper.

**History: En. Sec. 248, p. 186, L. 1867; re-en. Sec. 297, p. 92, Cod. Stat. 1871; re-en. Sec. 348, p. 136, L. 1877; re-en. Sec. 348, 1st Div. Rev. Stat. 1879; re-en. Sec. 360, 1st Div. Comp. Stat. 1887; re-en. Sec. 1292, C. Civ. Proc. 1895; re-en. Sec. 6863, Rev. C. 1907; re-en. Sec. 9469, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 728; re-en. Sec. 9469, R.C.M. 1935; R.C.M. 1947, 93-6003.**

**71-1-227. Injunction to prevent injury to property.** The court may, by injunction, upon good cause shown, restrain the party in possession from doing any act to the injury of real property during the foreclosure of a mortgage thereon.

**History: En. Sec. 240, p. 93, Bannack Stat.; re-en. Sec. 261, p. 188, L. 1867; re-en. Sec. 310, p. 95, Cod. Stat. 1871; re-en. Sec. 360, p. 139, L. 1877; re-en. Sec. 360, 1st Div. Rev. Stat. 1879; re-en. Sec. 372, 1st Div. Comp. Stat. 1887; re-en. Sec. 1318, C. Civ. Proc. 1895; re-en. Sec. 6878, Rev. C. 1907; re-en. Sec. 9496, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 745; re-en. Sec. 9496, R.C.M. 1935; R.C.M. 1947, 93-6220(part).**

**71-1-228. Rights of redemption applicable.** All of the rights, powers, and privileges concerning the redemption from sales of real estate applicable to the sales of real estate under foreclosure proceedings or sales under execution shall be granted and allowed to sales of real estate under and by virtue of the power of sale contained in any mortgage or deed of trust in this state, except to sales of real estate under and by virtue of the power of sale conferred upon a trustee under a trust indenture as defined in the "Small Tract Financing Act of Montana".

**History: En. Sec. 2, Ch. 165, L. 1917; re-en. Sec. 9472, R.C.M. 1921; re-en. Sec. 9472, R.C.M. 1935; amd. Sec. 19, Ch. 177, L. 1963; R.C.M. 1947, 93-6006.**

**71-1-229. Possession of lands prior to foreclosure upon default and during period of redemption.** The purchaser of lands at mortgage foreclosure is not entitled to the possession thereof as against the execution debtor during the period of redemption allowed by law while said execution debtor personally occupies the land as a home for himself and his family. It shall be unlawful to insert in any mortgage of real estate any provision or language intended to constitute a waiver by the owner of real estate personally occupying land as a home for himself and family of the provision of this section or any provision or language intended to give the mortgagee possession of the land or premises prior to foreclosure upon default of tax, principal, or interest payments. The intention hereof being to insure to such owner the possession of his land prior to foreclosure and during the year of redemption.

**History: En. Sec. 1, Ch. 230, L. 1921; re-en. Sec. 9449, R.C.M. 1921; amd. Sec. 1, Ch. 150, L. 1933; re-en. Sec. 9449, R.C.M. 1935; R.C.M. 1947, 93-5841(part).**

**71-1-230. Action to redeem mortgage.** An action to redeem a mortgage of real property, with or without an account of rents and profits, may be brought by the mortgagor or those claiming under him against the mortgagee in possession or those claiming under him, unless he or they have continuously maintained an adverse possession of the mortgaged premises for 10 years after breach of some condition of the mortgage.

**History: En. Sec. 521, C. Civ. Proc. 1895; re-en. Sec. 6454, Rev. C. 1907; re-en. Sec. 9044, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 346; re-en. Sec. 9044, R.C.M. 1935; R.C.M. 1947, 93-2616.**

**71-1-231. Redemption by multiple mortgagors.** If there is more than one such mortgagor or more than one person claiming under a mortgagor, some of whom are not entitled to maintain such an action under the provisions of 71-1-230 or Title 27, chapter 2, any one of them who is entitled to maintain such an action may redeem therein a divided or undivided part of the mortgaged premises, according as his interest may appear, and have an accounting for a part of the rents and profits proportionate to his interest in the mortgaged premises, on payment of a part of the mortgage money bearing the same proportion to the whole of such money as the value of his divided or undivided interest in the premises bears to the whole of such premises.

**History: En. Sec. 522, C. Civ. Proc. 1895; re-en. Sec. 6455, Rev. C. 1907; re-en. Sec. 9045, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 347; re-en. Sec. 9045, R.C.M. 1935; R.C.M. 1947, 93-2617.**

**71-1-232. Deficiency judgment not allowed on foreclosure of purchase price mortgage.** Upon the foreclosure of any mortgage, executed to any vendor of real property or to his heirs, executors, administrators, or assigns for the balance of the purchase price of such real property, the mortgagee shall not be entitled to a deficiency judgment on account of such mortgage or note or obligation secured by the same.

**History: En. Sec. 1, Ch. 2, L. 1935; re-en. Sec. 9473.1, R.C.M. 1935; R.C.M. 1947, 93-6008.**

**71-1-233. Attorney's fee on foreclosure.** In an action to foreclose a mortgage of real property, the court must allow as a part of the costs a reasonable attorney's fee, which shall be fixed by the court, any stipulation in the instrument or any agreement between the parties to the contrary notwithstanding.

**History: En. Sec. 1862, C. Civ. Proc. 1895; re-en. Sec. 7165, Rev. C. 1907; re-en. Sec. 9798, R.C.M. 1921; re-en. Sec. 9798, R.C.M. 1935; amd. Sec. 11-169, Ch. 264, L. 1963; R.C.M. 1947, 93-8613(part).**

**71-1-234. Attorney's fee — petition and notice.** If the mortgagee shall demand attorneys' fees in case of the sale of real estate under and by virtue of the power of sale contained in any mortgage or deed of trust in this state, except in case of the sale of real estate by virtue of a power of sale conferred upon a trustee under a trust indenture as defined in the "Small Tract Financing Act of Montana", he shall petition the district court of the county in which said real estate or any part thereof may be situated to fix the amount of such attorney's fee, and a copy of such petition shall be served upon all parties having or claiming an interest of record in the property to be sold or such of them as may be found within the state, which copy of said petition must be served at least 10 days before the day fixed for hearing, and notice of the time and place of such hearing shall be served at the same time as the copy of said petition is served. Such petition shall be acted upon by the district court before the notice of sale by publication or posting, as hereinbefore provided for, shall be given.

**History: En. Sec. 3, Ch. 165, L. 1917; re-en. Sec. 9473, R.C.M. 1921; re-en. Sec. 9473, R.C.M. 1935; amd. Sec. 20, Ch. 177, L. 1963; R.C.M. 1947, 93-6007.**

**71-1-235. Instruments — negotiability and remedies.** Nothing in this part shall be deemed to affect the negotiability of an instrument, and nothing in this part shall be deemed to limit remedies otherwise available to the purchaser of a promissory note secured by a mortgage unless such purchaser at the time of purchase had notice that the note was so secured.

**History: En. 93-6010 by Sec. 11-168, Ch. 264, L. 1963; R.C.M. 1947, 93-6010.**

## Part 3

## Small Tract Financing

**71-1-301. Short title.** This part may be cited as the "Small Tract Financing Act of Montana".

**History: En. Sec. 1, Ch. 177, L. 1963; R.C.M. 1947, 52-401.**

**71-1-302. Policy.** Because the financing of homes and business expansion is essential to the development of the state of Montana and because such financing, usually involving areas of real estate of not more than 15 acres, has been restricted by the laws relating to mortgages of real property and because more such financing of homes and business expansion is available if the parties can use security instruments and procedures not subject to all the provisions of the mortgage laws, it is hereby declared to be the public policy of the state of Montana to permit the use of trust indentures for estates in real property of not more than 15 acres as hereinafter provided.

**History: En. Sec. 2, Ch. 177, L. 1963; amd. Sec. 1, Ch. 337, L. 1974; R.C.M. 1947, 52-402.**

**71-1-303. Definitions.** As used in this part, unless the context requires otherwise the following definitions apply:

(1) "Beneficiary" means the person named or otherwise designated in a trust indenture as the person for whose benefit a trust indenture is given or his successor in interest, and who shall not be the trustee.

(2) "Fifteen acres" means 15 acres of land.

(3) "Grantor" means the person conveying real property by a trust indenture as security for the performance of an obligation.

(4) "Trust indenture" means an indenture executed in conformity with this part and conveying real property to a trustee in trust to secure the performance of an obligation of the grantor or other person named in the indenture to a beneficiary.

(5) "Trustee" means a person to whom the legal title to real property is conveyed by a trust indenture or his successor in interest.

**History: En. Sec. 3, Ch. 177, L. 1963; amd. Sec. 2, Ch. 337, L. 1974; R.C.M. 1947, 52-403(part).**

**71-1-304. Trust indentures authorized — power of sale for breach in trustee.** (1) Transfers in trust of any interest in real property of an area not exceeding 15 acres may be made to secure the performance of an obligation of a grantor or any other person named in the indenture to a beneficiary provided that it shall be unlawful to substitute a trust indenture for any mortgage in existence on March 5, 1963.

(2) Where any transfer in trust of any interest in real property is hereafter made to secure the performance of such an obligation, a power of sale is hereby conferred upon the trustee to be exercised after a breach of the obligation for which such transfer is security.

(3) A trust indenture executed in conformity with this part may be foreclosed by advertisement and sale in the manner hereinafter provided or, at the option of the beneficiary, by judicial procedure as provided by law for the foreclosure of mortgages on real property. The power of sale may be exercised by the trustee without express provision therefor in the trust indenture.

(4) Where the trust indenture states that the real property involved does not exceed 15 acres, such statement shall be binding upon all parties and conclusive as to compliance with the provisions of this part relative to the power to make a transfer, trust, and power of sale.

**History: (1) thru (3)En. Sec. 4, Ch. 177, L. 1963; amd. Sec. 3, Ch. 337, L. 1974; Sec. 52-404, R.C.M. 1947; (4)En. Sec. 3, Ch. 177, L. 1963; amd. Sec. 2, Ch. 337, L. 1974; Sec. 52-403, R.C.M. 1947; R.C.M. 1947, 52-403(part), 52-404.**

**71-1-305. Trust indenture considered to be mortgage on real property.** A trust indenture is deemed to be a mortgage on real property and is subject to all laws relating to mortgages on real property except to the extent that such laws are inconsistent with the provisions of this part, in which event the provisions of this part shall control. For the purpose of applying the mortgage laws, the grantor in a trust indenture is deemed the mortgagor and the beneficiary is deemed the mortgagee.

**History: En. Sec. 17, Ch. 177, L. 1963; R.C.M. 1947, 52-417.**

**71-1-306. Qualifications of trustee — successor trustee.** (1) The trustee of a trust indenture under this part shall be:

(a) an attorney who is licensed to practice law in Montana;

(b) a bank, trust company, or savings and loan association authorized to do business in Montana under the laws of Montana or the United States; or

(c) a title insurance or abstract company authorized to do business in Montana under the laws of Montana.

(2) The beneficiary may appoint a successor trustee at any time by filing for record, in the office of the clerk and recorder of each county in which the trust property or some part thereof is situated, a substitution of trustee. The substitution shall identify the trust indenture by stating the names of the original parties thereto and the date of recordation and the book and page where the same is recorded, shall state the name and mailing address of the new trustee, and shall be executed and acknowledged by all of the beneficiaries designated in the trust indenture or their successors in interest. From the time the substitution is filed for record, the new trustee shall be vested with all the power, duties, authority, and title of the trustee named in the trust indenture and of any successor trustee.

**History: En. Sec. 5, Ch. 177, L. 1963; R.C.M. 1947, 52-405.**

**71-1-307. Reconveyance upon performance — liability for failure to reconvey.** Upon performance of the obligation secured by the trust indenture, the trustee, upon written request of the beneficiary, shall reconvey the interest in real property described in the trust indenture to the grantor. In the event the obligation is performed and the beneficiary refuses to request reconveyance or the trustee refuses to reconvey the property, the beneficiary or trustee so refusing shall be liable as provided by law in the case of refusal to execute a discharge or satisfaction of a mortgage on real property.

**History: En. Sec. 6, Ch. 177, L. 1963; R.C.M. 1947, 52-406.**

**71-1-308 through 71-1-310 reserved.**

**71-1-311. Time for foreclosure same as mortgage.** The foreclosure of a trust indenture by advertisement and sale or by judicial procedure shall be commenced within the time, including extensions, provided by law for the foreclosure of a mortgage on real property.

**History: En. Sec. 7, Ch. 177, L. 1963; R.C.M. 1947, 52-407.**

**71-1-312. Discontinuance of foreclosure proceedings when entire amount of default paid.** (1) Whenever all or a portion of any obligation secured by a trust indenture has, prior to the maturity date fixed in such obligation, become due or been declared due by reason of a breach or default in the performance of any obligation secured by the trust indenture, including a default in the payment of interest or of any installment of principal or by reason of failure of the grantor to pay, in accordance with the terms of such trust indenture, taxes, assessments, premiums for insurance, or advances made by the beneficiary in accordance with the terms of such obligation or of such trust indenture, the grantor or his successor in interest in the trust property or any part thereof or any other person having a subordinate lien or encumbrance of record thereon or any beneficiary under a subordinate trust indenture, at any time prior to the time fixed by the trustee for the trustee's sale if the power of sale is to be exercised, may pay to the beneficiary or his successor in interest the entire amount then due under the terms of such trust indenture and the obligation secured thereby (including costs and expenses actually incurred and reasonable trustee's and attorney's fees) other than such portion of the principal as would not then be due had no default occurred and thereby cure the default theretofore existing.

(2) Thereupon all proceedings theretofore had or instituted to foreclose the trust indenture shall be canceled and the obligation and the trust indenture shall be reinstated and shall be and remain in force and effect the same as if no such acceleration had occurred.

(3) If the default is cured and the obligation and the trust indenture reinstated in the manner hereinabove provided, the beneficiary or his assignee shall, on demand of any person having an interest in the trust property, execute, acknowledge, and deliver to him a request that the trustee execute, acknowledge, and deliver a cancellation of the recorded notice of sale under such trust indenture.

(4) Any beneficiary under a trust indenture or his assignee who, for a period of 30 days after such demand, refuses to request the trustee to execute, acknowledge, and deliver such cancellation shall be liable to the person entitled to such request for all damages resulting from such refusal.

(5) A cancellation of a recorded notice of sale shall, when executed and acknowledged, be entitled to be recorded and shall be sufficient if it sets forth a reference to the trust indenture and the book and page where the same is recorded, a reference to the notice of sale and to the book and page where the same is recorded, and a statement that such notice of sale is canceled.

**History: En. Sec. 12, Ch. 177, L. 1963; R.C.M. 1947, 52-412.**

**71-1-313. Conditions for foreclosure by advertisement and sale.** The trustee may foreclose a trust indenture by advertisement and sale under this part if:

(1) the trust indenture, any assignments of the trust indenture by the trustee or the beneficiary, and any appointment of a successor trustee are recorded in the office of the clerk and recorder of each county in which the property described in the trust indenture or some part thereof is situated;

(2) there is a default by the grantor or other person owing an obligation or by their successors in interest, the performance of which is secured by the trust indenture, with respect to any provision in the indenture which authorizes sale in the event of default of such provision; and

(3) the trustee or beneficiary shall have filed for record in the office of the clerk and recorder in each county where the property described in the indenture or some part thereof is situated a notice of sale, duly executed and acknowledged by such trustee or beneficiary, setting forth:

(a) the names of the grantor, trustee, and beneficiary in the trust indenture and the name of any successor trustee;

(b) a description of the property covered by the trust indenture;

(c) the book and page of the mortgage records where the trust indenture is recorded;

(d) the default for which the foreclosure is made;

(e) the sum owing on the obligation secured by the trust indenture;

(f) the trustee's or beneficiary's election to sell the property to satisfy the obligation;

(g) the date of sale, which shall not be less than 120 days subsequent to the date on which the notice of sale is filed for record, and the time of sale, which shall be between the hours of 9 a.m. and 4 p.m., mountain standard time;

(h) the place of sale which shall be at the courthouse of the county or one of the counties where the property is situated or at the location of the property or at the trustee's usual place of business if within the county or one of the counties where the property is situated.

**History: En. Sec. 8, Ch. 177, L. 1963; R.C.M. 1947, 52-408(1).**

**71-1-314. Requests for copies of notice of sale.** At any time subsequent to the recordation of a trust indenture and prior to the recordation of notice of sale under the indenture, any person desiring a copy of any notice of sale under a trust indenture as provided in 71-1-315(1) may cause to be filed for record in the office of the county clerk and recorder of the county or counties in which any part or parcel of the real property is situated, a duly acknowledged request for a copy of any notice of sale, showing service upon the trustee. The request shall contain the name and address of the person requesting a copy of the notice and shall identify the trust indenture by stating the names of the parties to the indenture, the date of recordation of the indenture, and the book and page where the indenture is recorded. The county clerk and recorder shall immediately make a cross-reference of the request to the trust indenture either on the margin of the page where the trust indenture is recorded or in some other suitable place. No request, statement, or notation placed on the record pursuant to this section shall affect title to the property or be deemed notice to any person that any person so recording the request has any right, title, interest in, lien, or charge upon the property referred to in the trust indenture.

**History: En. Sec. 15, Ch. 177, L. 1963; R.C.M. 1947, 52-415.**

**71-1-315. Notice — sale — payment.** A trust deed may be foreclosed by advertisement and sale in the manner hereinafter provided:

(1) The trustee shall give notice of the sale in the following manner:

(a) At least 120 days before the date fixed for the trustee's sale, a copy of the recorded notice of sale shall be mailed by registered or certified mail to:

(i) the grantor, at the grantor's address as set forth in the trust indenture or (in the event no address of the grantor is set forth in the trust indenture) at the grantor's last known address;

(ii) each person designated in the trust indenture to receive notice of sale whose address is set forth therein, at such address;

(iii) each person who has filed for record a request for a copy of notice of sale within the time and in the manner hereinafter provided, at the address of such person as set forth in such request;

(iv) any successor in interest to the grantor whose interest and address appear of record at the filing date and time of the notice of sale, at such address;

(v) any person having a lien or interest subsequent to the interest of the trustee and whose lien or interest and address appear of record at the filing date and time of the notice of sale, at such address.

(b) At least 20 days before the date fixed for the trustee's sale, a copy of the recorded notice of sale shall be posted in some conspicuous place on the property to be sold. Upon request of the trustee, the notice of sale shall be posted by a sheriff or constable of the county wherein the property to be sold is located.

(c) A copy of the notice of sale shall be published in a newspaper of general circulation published in any county in which the property or some part thereof is situated, at least once each week for 3 successive weeks. If there is no such newspaper, then copies of the notice of sale shall be posted in at least three public places in each county in which the property or some part thereof is situated. The posting or the last publication shall be made at least 20 days before the date fixed for the trustee's sale.

(2) On or before the date of sale, there shall be filed for record in the office of the clerk and recorder of each county where the property or some part thereof is situated, affidavits of mailing, posting, and publication showing compliance with the requirements of this section.

(3) On the date and at the time and place designated in the notice of sale, the trustee or his attorney shall sell the property at public auction to the highest bidder. The property may be sold in one parcel or in separate parcels, and any person, including the beneficiary under the trust indenture but excluding the trustee, may bid at the sale. The person making the sale may, for any cause he deems expedient, postpone the sale for a period not exceeding 15 days by public proclamation at the time and place fixed in the notice of sale. No other notice of the postponed sale need be given.

(4) The purchaser at the sale shall pay the price bid in cash, and upon receipt of payment, the trustee shall execute and deliver a trustee's deed to the purchaser. In the event the purchaser refuses to pay the purchase price, the person conducting the sale shall have the right to resell the property at any time to the highest bidder. The party refusing to pay shall be liable for any loss occasioned thereby, and the person making the sale may also, in his discretion, thereafter reject any other bid of such person.

**History: Ap. p. Sec. 8, Ch. 177, L. 1963; Sec. 52-408, R.C.M. 1947; (1) thru (4)En. Sec. 9, Ch. 177, L. 1963; amd. Sec. 1, Ch. 53, L. 1977; Sec. 52-409, R.C.M. 1947; R.C.M. 1947, 52-408(2), 52-409.**

**71-1-316. Disposition of proceeds of sale.** The trustee shall apply the proceeds of the trustee's sale as follows:

(1) to the costs and expenses of exercising the power of sale and of the sale, including reasonable trustee's fees and attorney's fees;

(2) to the obligation secured by the trust indenture;

(3) the surplus, if any, to the person or persons legally entitled thereto, or the trustee, in his discretion, may deposit such surplus with the clerk and recorder of the county in which the sale took place. Upon depositing such surplus, the trustee shall be discharged from all further responsibility therefor and the clerk and recorder shall deposit the same with the county treasurer subject to the order of the district court of such county.

**History: En. Sec. 13, Ch. 177, L. 1963; R.C.M. 1947, 52-413.**

**71-1-317. Deficiency judgment not allowed.** When a trust indenture executed in conformity with this part is foreclosed by advertisement and sale, no other or further action, suit, or proceedings shall be taken or judgment entered for any deficiency against the grantor or his surety, guarantor, or successor in interest, if any, on the note, bond, or other obligation secured by the trust indenture or against any other person obligated on such note, bond, or other obligation.

**History: En. Sec. 14, Ch. 177, L. 1963; R.C.M. 1947, 52-414.**

**71-1-318. Trustee's deed.** (1) The trustee's deed to the purchaser at the trustee's sale may contain, in addition to a description of the property conveyed, recitals of compliance with the requirements of this part relating to the exercise of the power of sale and the sale, including recitals of the facts concerning the default, the notice given, the conduct of the sale, and the receipt of the purchase money from the purchaser.

(2) When the trustee's deed is recorded in the deed records of the county or counties where the property described in the deed is situated, the recitals contained in the deed and in the affidavits required under 71-1-315(2) shall be prima facie evidence in any court of the truth of the matters set forth therein, except that the

same shall be conclusive evidence in favor of subsequent bona fide purchasers and encumbrancers for value and without notice.

(3) The trustee's deed shall operate to convey to the purchaser, without right of redemption, the trustee's title and all right, title, interest, and claim of the grantor and his successors in interest and of all persons claiming by, through, or under them in and to the property sold, including all such right, title, interest, and claim in and to such property acquired by the grantor or his successors in interest subsequent to the execution of the trust indenture.

**History: En. Sec. 10, Ch. 177, L. 1963; R.C.M. 1947, 52-410.**

**71-1-319. Possession.** The purchaser at the trustee's sale shall be entitled to possession of the property on the 10th day following the sale, and any persons remaining in possession after that date under any interest, except one prior to the trust indenture, shall be deemed to be tenants at will.

**History: En. Sec. 11, Ch. 177, L. 1963; R.C.M. 1947, 52-411.**

**71-1-320. Trustees' fees and attorneys' fees.** Reasonable trustees' fees and attorneys' fees to be charged to the grantor in the event of foreclosure by advertisement and sale shall not exceed, in the aggregate, 5% of the amount due on the obligation, both principal and interest, at the time of the trustee's sale. If prior to the trustee's sale the obligation and the trust indenture shall be reinstated in accordance with provisions of 71-1-312, the reasonable trustees' fees and attorneys' fees to be charged to the grantor shall not exceed $150. In no event shall trustees' fees and attorneys' fees be charged to a grantor on account of any services rendered prior to the commencement of foreclosure.

**History: En. Sec. 16, Ch. 177, L. 1963; R.C.M. 1947, 52-416.**

# CHAPTER 2

# PLEDGES

### Part 1 — Pledges in General

Section
71-2-101. Definitions.
71-2-102. When contract considered a pledge.
71-2-103. Delivery required.
71-2-104. Pledgee or pledge holder for reward.
71-2-105. Gratuitous pledge holder.
71-2-106. Obligations of pledge holder.
71-2-107. Property pledged to extent of lien.
71-2-108. When pledge may not be withdrawn.
71-2-109. When real owner cannot defeat pledge.
71-2-110. Debtor's misrepresentation of value of pledge.

## Part 1

## Pledges in General

**71-2-101. Definitions.** (1) "Pledge" is a deposit of personal property by way of security for the performance of another's act.

(2) A pledgor and pledgee may agree upon a third person with whom to deposit the property pledged, who, if he accepts the deposit, is called a "pledge holder".

**History: (1)En. Sec. 3890, Civ. C. 1895; re-en. Sec. 5774, Rev. C. 1907; re-en. Sec. 8292, R.C.M. 1921; Cal. Civ. C. Sec. 2986; Field Civ. C. Sec. 1647; re-en. Sec. 8292, R.C.M. 1935; Sec. 65-101, R.C.M. 1947; (2)En. Sec. 3897, Civ. C. 1895; re-en. Sec. 5781, Rev. C. 1907; re-en. Sec. 8299, R.C.M. 1921; Cal. Civ. C. Sec. 2993; Field Civ. C. Sec. 1654; re-en. Sec. 8299, R.C.M. 1935; Sec. 65-108, R.C.M. 1947; R.C.M. 1947, 65-101, 65-108.**

**71-2-102. When contract considered a pledge.** Every contract by which the possession of personal property is transferred as security only is to be deemed a pledge.

**History: En. Sec. 3891, Civ. C. 1895; re-en. Sec. 5775, Rev. C. 1907; re-en. Sec. 8293, R.C.M. 1921; Cal. Civ. C. Sec. 2987; Field Civ. C. Sec. 1648; re-en. Sec. 8293, R.C.M. 1935; R.C.M. 1947, 65-102.**

**71-2-103. Delivery required.** The lien of a pledge is dependent on possession, and no pledge is valid until the property pledged is delivered to the pledgee or to a pledge holder, as hereafter prescribed.

**History: En. Sec. 3892, Civ. C. 1895; re-en. Sec. 5776, Rev. C. 1907; re-en. Sec. 8294, R.C.M. 1921; Cal. Civ. C. Sec. 2988; Field Civ. C. Sec. 1649; re-en. Sec. 8294, R.C.M. 1935; R.C.M. 1947, 65-103.**

**71-2-104. Pledgee or pledge holder for reward.** A pledgee or a pledge holder for reward assumes the duties and liabilities of a depositary for reward.

**History: En. Sec. 3901, Civ. C. 1895; re-en. Sec. 5785, Rev. C. 1907; re-en. Sec. 8303, R.C.M. 1921; Cal. Civ. C. Sec. 2997; Field Civ. C. Sec. 1658; re-en. Sec. 8303, R.C.M. 1935; R.C.M. 1947, 65-112.**

**71-2-105. Gratuitous pledge holder.** A gratuitous pledge holder assumes the duties and liabilities of a gratuitous depositary.

**History: En. Sec. 3902, Civ. C. 1895; re-en. Sec. 5786, Rev. C. 1907; re-en. Sec. 8304, R.C.M. 1921; Cal. Civ. C. Sec. 2998; Field Civ. C. Sec. 1659; re-en. Sec. 8304, R.C.M. 1935; R.C.M. 1947, 65-113.**

**71-2-106. Obligations of pledge holder.** (1) A pledge holder for reward cannot exonerate himself from his undertaking; and a gratuitous pledge holder can do so only by giving reasonable notice to the pledgor and pledgee to appoint a new pledge holder and, in case of their failure to agree, by depositing the property pledged with some impartial person, who will then be entitled to a reasonable compensation for his care of the same.

(2) A pledge holder must enforce all the rights of the pledgee unless authorized by him to waive them.

**History: (1)En. Sec. 3899, Civ. C. 1895; re-en. Sec. 5783, Rev. C. 1907; re-en. Sec. 8301, R.C.M. 1921; Cal. Civ. C. Sec. 2995; Field Civ. C. Sec. 1656; re-en. Sec. 8301, R.C.M. 1935; Sec. 65-110, R.C.M. 1947; (2)En. Sec. 3900, Civ. C. 1895; re-en. Sec. 5784, Rev. C. 1907; re-en. Sec. 8302, R.C.M. 1921; Cal. Civ. C. Sec. 2996; Field Civ. C. Sec. 1657; re-en. Sec. 8302, R.C.M. 1935; Sec. 65-111, R.C.M. 1947; R.C.M. 1947, 65-110, 65-111.**

**71-2-107. Property pledged to extent of lien.** One who has a lien upon property may pledge it to the extent of his lien.

**History: En. Sec. 3894, Civ. C. 1895; re-en. Sec. 5778, Rev. C. 1907; re-en. Sec. 8296, R.C.M. 1921; Cal. Civ. C. Sec. 2990; Field Civ. C. Sec. 1651; re-en. Sec. 8296, R.C.M. 1935; R.C.M. 1947, 65-105.**

**71-2-108. When pledge may not be withdrawn.** One who pledges property as security for the obligation of another cannot withdraw the property pledged otherwise than as a pledgor for himself might, and if he receives from the debtor a consideration for the pledge, he cannot withdraw it without his consent.

**History: En. Sec. 3898, Civ. C. 1895; re-en. Sec. 5782, Rev. C. 1907; re-en. Sec. 8300, R.C.M. 1921; Cal. Civ. C. Sec. 2994; Field Civ. C. Sec. 1655; re-en. Sec. 8300, R.C.M. 1935; R.C.M. 1947, 65-109.**

**71-2-109. When real owner cannot defeat pledge.** One who has allowed another to assume the apparent ownership of property for the purpose of making any transfer of it cannot set up his own title to defeat a pledge of the property made by the other to a pledgee who received the property in good faith in the ordinary course of business and for value.

**History: En. Sec. 3895, Civ. C. 1895; re-en. Sec. 5779, Rev. C. 1907; re-en. Sec. 8297, R.C.M. 1921; Cal. Civ. C. Sec. 2991; Field Civ. C. Sec. 1652; re-en. Sec. 8297, R.C.M. 1935; R.C.M. 1947, 65-106.**

**71-2-110. Debtor's misrepresentation of value of pledge.** Where a debtor has obtained credit or an extension of time by a fraudulent misrepresentation of the value of property pledged by or for him, the creditor may demand a further pledge to correspond with the value represented and in default thereof may recover his debt immediately, though it be not actually due.

**History: En. Sec. 3903, Civ. C. 1895; re-en. Sec. 5787, Rev. C. 1907; re-en. Sec. 8305, R.C.M. 1921; Cal. Civ. C. Sec. 2999; Field Civ. C. Sec. 1660; re-en. Sec. 8305, R.C.M. 1935; R.C.M. 1947, 65-114.**

# CHAPTER 3

## LIENS

### Part 1 — General Provisions

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71-3-110. Enforcement of obligation by creditor.
71-3-111. Creation of lien not a personal obligation.
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## Part 1

## General Provisions

**71-3-101. Definitions.** (1) A "lien" is a charge imposed in some mode other than by a transfer in trust upon specific property by which it is made security for the performance of an act. Liens are either general or special.

(2) A "general lien" is one which the holder thereof is entitled to enforce as a security for the performance of all the obligations or all of a particular class of obligations which exist in his favor against the owner of the property.

(3) A "special lien" is one which the holder thereof can enforce only as security for the performance of a particular act or obligation and of such obligations as may be incidental thereto.

**History:** (1)Ap. p. Sec. 3730, Civ. C. 1895; re-en. Sec. 5704, Rev. C. 1907; re-en. Sec. 8219, R.C.M. 1921; Cal. Civ. C. Sec. 2872; Based on Field Civ. C. Sec. 1582; re-en. Sec. 8219, R.C.M. 1935; Sec. 45-101, R.C.M. 1947; Ap. p. Sec. 3731, Civ. C. 1895; re-en. Sec. 5705, Rev. C. 1907; re-en. Sec. 8220, R.C.M. 1921; Cal. Civ. C. Sec. 2873; Field Civ. C. Sec. 1583; re-en. Sec. 8220, R.C.M. 1935; Sec. 45-102, R.C.M. 1947; (2)En. Sec. 3732, Civ. C. 1895; re-en. Sec. 5706, Rev. C. 1907; re-en. Sec. 8221, R.C.M. 1921; Cal. Civ. C. Sec. 2874; Field Civ. C. Sec. 1584; re-en. Sec. 8221, R.C.M. 1935; Sec. 45-103, R.C.M. 1947; (3)En. Sec. 3733, Civ. C. 1895; re-en.

**Sec. 5707, Rev. C. 1907; re-en. Sec. 8222, R.C.M. 1921; Cal. Civ. C. Sec. 2875; Field Civ. C. Sec. 1585; re-en. Sec. 8222, R.C.M. 1935; Sec. 45-104, R.C.M. 1947; R.C.M. 1947, 45-101, 45-102, 45-103, 45-104.**

**71-3-102. How liens created.** A lien is created:
(1) by contract of the parties; or
(2) by operation of law.

**History: En. Sec. 3740, Civ. C. 1895; re-en. Sec. 5710, Rev. C. 1907; re-en. Sec. 8225, R.C.M. 1921; Cal. Civ. C. Sec. 2881; Field Civ. C. Sec. 1587; re-en. Sec. 8225, R.C.M. 1935; R.C.M. 1947, 45-107.**

**71-3-103. No lien for claim not due.** No lien arises by mere operation of law until the time at which the act to be secured thereby ought to be performed.

**History: En. Sec. 3741, Civ. C. 1895; re-en. Sec. 5711, Rev. C. 1907; re-en. Sec. 8226, R.C.M. 1921; Cal. Civ. C. Sec. 2882; Field Civ. C. Sec. 1588; re-en. Sec. 8226, R.C.M. 1935; R.C.M. 1947, 45-108.**

**71-3-104. Lien by agreement.** A lien may be created by contract, to take immediate effect, as security for the performance of obligations not then in existence.

**History: En. Sec. 3743, Civ. C. 1895; re-en. Sec. 5713, Rev. C. 1907; re-en. Sec. 8228, R.C.M. 1921; Cal. Civ. C. Sec. 2884; Field Civ. C. Sec. 1590; re-en. Sec. 8228, R.C.M. 1935; R.C.M. 1947, 45-110.**

**71-3-105. Lien on future interest.** An agreement may be made to create a lien upon property not yet acquired by the party agreeing to give the lien or not yet in existence. Except as otherwise provided by the Uniform Commercial Code, in such case the lien agreed for attaches from the time when the party agreeing to give it acquires an interest in the thing, to the extent of such interest.

**History: En. Sec. 3742, Civ. C. 1895; re-en. Sec. 5712, Rev. C. 1907; re-en. Sec. 8227, R.C.M. 1921; Cal. Civ. C. Sec. 2883; Field Civ. C. Sec. 1589; re-en. Sec. 8227, R.C.M. 1935; amd. Sec. 11-118, Ch. 264, L. 1963; R.C.M. 1947, 45-109.**

**71-3-106. Extent of lien.** The existence of a lien upon property does not of itself entitle the person in whose favor it exists to a lien upon the same property for the performance of any other obligation than that which the lien originally secured.

**History: En. Sec. 3753, Civ. C. 1895; re-en. Sec. 5717, Rev. C. 1907; re-en. Sec. 8232, R.C.M. 1921; Cal. Civ. C. Sec. 2891; Field Civ. C. Sec. 1594; re-en. Sec. 8232, R.C.M. 1935; R.C.M. 1947, 45-114.**

**71-3-107. Prior liens.** Where the holder of a special lien is compelled to satisfy a prior lien for his own protection, he may enforce payment of the amount so paid by him as a part of the claim for which his own lien exists.

**History: En. Sec. 3734, Civ. C. 1895; re-en. Sec. 5708, Rev. C. 1907; re-en. Sec. 8223, R.C.M. 1921; Cal. Civ. C. Sec. 2876; re-en. Sec. 8223, R.c.M. 1935; R.C.M. 1947, 45-105.**

**71-3-108. Lien or contract for lien transfers no title.** Notwithstanding an agreement to the contrary, a lien or a contract for a lien transfers no title to the property subject to the lien.

**History: En. Sec. 3750, Civ. C. 1895; re-en. Sec. 5714, Rev. C. 1907; re-en. Sec. 8229, R.C.M. 1921; Cal. Civ. C. Sec. 2888; Field Civ. C. Sec. 1591; re-en. Sec. 8229, R.C.M. 1935; R.C.M. 1947, 45-111.**

**71-3-109. Certain contracts void.** Except as otherwise provided by the Uniform Commercial Code, all contracts for the forfeiture of property subject to a lien in satisfaction of the obligation secured thereby and all contracts in restraint of the right of redemption from a lien are void.

**History: En. Sec. 3751, Civ. C. 1895; re-en. Sec. 5715, Rev. C. 1907; re-en. Sec. 8230, R.C.M. 1921; Cal. Civ. C. Sec. 2889; Based on Field Civ. C. Sec. 1592; re-en. Sec. 8230, R.C.M. 1935; amd. Sec. 11-119, Ch. 264, L. 1963; R.C.M. 1947, 45-112.**

**71-3-110. Enforcement of obligation by creditor.** The existence of a lien, as security for the performance of an obligation, does not affect the right of the creditor to enforce the obligation without regard to the lien.

**History: En. Sec. 3754, Civ. C. 1895; re-en. Sec. 5718, Rev. C. 1907; re-en. Sec. 8233, R.C.M. 1921; Field Civ. C. Sec. 1595; re-en. Sec. 8233, R.C.M. 1935; R.C.M. 1947, 45-115.**

**71-3-111. Creation of lien not a personal obligation.** The creation of a lien does not itself imply that any person is bound to perform the act for which the lien is a security.

**History: En. Sec. 3752, Civ. C. 1895; re-en. Sec. 5716, Rev. C. 1907; re-en. Sec. 8231, R.C.M. 1921; Cal. Civ. C. Sec. 2890; Field Civ. C. Sec. 1593; re-en. Sec. 8231, R.C.M. 1935; R.C.M. 1947, 45-113.**

**71-3-112. Holder of lien not entitled to compensation.** Except as otherwise provided by the Uniform Commercial Code, one who holds property by virtue of a lien thereon is not entitled to compensation from the owner thereof for any trouble or expense which he incurs respecting it, except to the same extent as a borrower under 70-7-110 and 70-7-111.

**History: En. Sec. 3755, Civ. C. 1895; re-en. Sec. 5719, Rev. C. 1907; re-en. Sec. 8234, R.C.M. 1921; Cal. Civ. C. Sec. 2892; Field Civ. C. Sec. 1596; re-en. Sec. 8234, R.C.M. 1935; amd. Sec. 11-120, Ch. 264, L. 1963; R.C.M. 1947, 45-116.**

**71-3-113. Priority of liens.** Other things being equal, different liens upon the same property have priority according to the time of their creation.

**History: En. Sec. 3770, Civ. C. 1895; re-en. Sec. 5720, Rev. C. 1907; re-en. Sec. 8235, R.C.M. 1921; Cal. Civ. C. Sec. 2897; Based on Field Civ. C. Sec. 1597; re-en. Sec. 8235, R.C.M. 1935; R.C.M. 1947, 45-201.**

**71-3-114. Priority of purchase money mortgage.** Except as otherwise provided by law, a mortgage given for the price of real property at the time of its conveyance has priority over all other liens created against the purchaser, subject to the operation of the recording laws.

**History: En. Sec. 3771, Civ. C. 1895; re-en. Sec. 5721, Rev. C. 1907; re-en. Sec. 8236, R.C.M. 1921; Cal. Civ. C. Sec. 2898; re-en. Sec. 8236, R.C.M. 1935; R.C.M. 1947, 45-202.**

**71-3-115. Order of resort to different funds.** Where one has a lien upon several things and other persons have subordinate liens upon or interests in some but not all of the same things, the person having the prior lien, if he can do so without risk of loss to himself or of injustice to other persons, must resort to the property in the following order, on the demand of any party interested:

(1) to the things upon which he has an exclusive lien;

(2) to the things which are subject to the fewest subordinate liens;

(3) in like manner inversely to the number of subordinate liens upon the same thing; and

(4) when several things are within one of the foregoing classes and subject to the same number of liens, resort must be had:

(a) first, to the things which have not been transferred since the prior lien was created;

(b) second, to the things which have been so transferred without a valuable consideration; and

(c) third, to the things which have been so transferred for a valuable consideration in the inverse order of the transfer.

**History: En. Sec. 3772, Civ. C. 1895; re-en. Sec. 5722, Rev. C. 1907; re-en. Sec. 8237, R.C.M. 1921; Cal. Civ. C. Sec. 2899; Based on Field Civ. C. Sec. 1599; re-en. Sec. 8237, R.C.M. 1935; R.C.M. 1947, 45-203.**

**71-3-116. Redemption.** Redemption from a lien is made by performing or offering to perform the act for the performance of which it is a security and paying or offering to pay the damages, if any, to which the holder of the lien is entitled for delay.

**History: En. Sec. 3782, Civ. C. 1895; re-en. Sec. 5725, Rev. C. 1907; re-en. Sec. 8240, R.C.M. 1921; Cal. Civ. C. Sec. 2905; Field Civ. C. Sec. 1602; re-en. Sec. 8240, R.C.M. 1935; R.C.M. 1947, 45-303.**

**71-3-117. Right to redeem.** Except as otherwise provided by the Uniform Commercial Code, every person having an interest in property subject to a lien has a right to redeem it from the lien at any time after the claim is due and before his right of redemption is foreclosed.

**History: En. Sec. 3780, Civ. C. 1895; re-en. Sec. 5723, Rev. C. 1907; re-en. Sec. 8238, R.C.M. 1921; Cal. Civ. C. Sec. 2903; re-en. Sec. 8238, R.C.M. 1935; amd. Sec. 11-121, Ch. 264, L. 1963; R.C.M. 1947, 45-301.**

**71-3-118. Rights of inferior lienor.** One who has a lien inferior to another upon the same property has a right to:

(1) redeem the property in the same manner as its owner might from the superior lien; and

(2) be subrogated to all the benefits of the superior lien, when necessary for the protection of his interests, upon satisfying the claim secured thereby.

**History: En. Sec. 3781, Civ. C. 1895; re-en. Sec. 5724, Rev. C. 1907; re-en. Sec. 8239, R.C.M. 1921; Cal. Civ. C. Sec. 2904; Field Civ. C. Sec. 1601; re-en. Sec. 8239, R.C.M. 1935; R.C.M. 1947, 45-302.**

**71-3-119. Lien accessory to performance.** A lien is to be accessory to the act for the performance of which it is a security, whether any person is bound for such performance or not, and is extinguishable in like manner with any other accessory obligation.

**History: En. Sec. 3790, Civ. C. 1895; re-en. Sec. 5726, Rev. C. 1907; re-en. Sec. 8241, R.C.M. 1921; Cal. Civ. C. Sec. 2909; re-en. Sec. 8241, R.C.M. 1935; R.C.M. 1947, 45-304.**

**71-3-120. Effect of partial performance.** The partial performance of an act secured by a lien does not extinguish the lien upon any part of the property subject thereto, even if it is divisible.

**History: En. Sec. 3793, Civ. C. 1895; re-en. Sec. 5729, Rev. C. 1907; re-en. Sec. 8244, R.C.M. 1921; Cal. Civ. C. Sec. 2912; Field Civ. C. Sec. 1606; re-en. Sec. 8244, R.C.M. 1935; R.C.M. 1947, 45-307.**

**71-3-121. Extinction by sale or wrongful conversion.** The sale of any property on which there is a lien in satisfaction of the claim secured thereby or, in case of personal property, its wrongful conversion by the person holding the lien extinguishes the lien thereon.

**History: En. Sec. 3791, Civ. C. 1895; re-en. Sec. 5727, Rev. C. 1907; re-en. Sec. 8242, R.C.M. 1921; Cal. Civ. C. Sec. 2910; Field Civ. C. Sec. 1604; re-en. Sec. 8242, R.C.M. 1935; R.C.M. 1947, 45-305.**

**71-3-122. Lien extinguished by statute of limitations.** A lien is extinguished by the lapse of the time within which, under the provisions of Title 27, an action can be brought upon the principal obligation.

**History: En. Sec. 3792, Civ. C. 1895; re-en. Sec. 5728, Rev. C. 1907; re-en. Sec. 8243, R.C.M. 1921; Cal. Civ. C. Sec. 2911; Field Civ. C. Sec. 1605; re-en. Sec. 8243, R.C.M. 1935; R.C.M. 1947, 45-306.**

**71-3-123. When restoration extinguishes lien.** Except as otherwise provided by the Uniform Commercial Code, the voluntary restoration of property to its owner by the holder of a lien thereon, dependent upon possession, extinguishes the lien as to such property, unless otherwise agreed by the parties, and extinguishes it, notwithstanding any such agreement, as to creditors of the owner and persons subsequently acquiring a title to the property or a lien thereon in good faith and for a good consideration.

**History: En. Sec. 3794, Civ. C. 1895; re-en. Sec. 5730, Rev. C. 1907; re-en. Sec. 8245, R.C.M. 1921; Cal. Civ. C. Sec. 2913; Based on Field Civ. C. Sec. 1607; re-en. Sec. 8246, R.C.M. 1935; amd. Sec. 11-122, Ch. 264, L. 1963; R.C.M. 1947, 45-308.**

**71-3-124. Filing costs and attorneys' fees to be recovered on foreclosure of liens.** In an action to foreclose any of the liens provided for by parts 3, 4, 5, 6, 8, or 10 of this chapter, the court must allow as costs the money paid for filing and recording the lien and a reasonable attorney's fee in the district and supreme courts, and such costs and attorneys' fees must be allowed to each claimant whose lien is established, and such reasonable attorneys' fees must be allowed to the defendant against whose property a lien is claimed, if such lien be not established.

**History: En. Sec. 1863, C. Civ. Proc. 1895; re-en. Sec. 7166, Rev. C. 1907; amd. Sec. 1, Ch. 100, L. 1921; re-en. Sec. 9799, R.C.M. 1921; amd. Sec. 1, Ch. 69, L. 1925; amd. Sec. 1, Ch. 19, L. 1929; re-en. Sec. 9799, R.C.M. 1935; R.C.M. 1947, 93-8614.**

## Part 2

## Federal Tax Liens

**71-3-201. Short title.** This part may be cited as the "Revised Uniform Federal Tax Lien Registration Act".

**History: En. Sec. 6, Ch. 228, L. 1967; R.C.M. 1947, 45-1506.**

**71-3-202. Uniformity of interpretation.** This part shall be so construed as to effectuate its general purpose to make uniform the laws of those states which enact it.

**History: En. Sec. 5, Ch. 228, L. 1967; R.C.M. 1947, 45-1505.**

**71-3-203. Execution of notices and certificates.** Certification by the secretary of the treasury of the United States or his delegate of notices of liens, certificates, or other notices affecting tax liens entitles them to be filed. No other attestation, certification, or acknowledgment is necessary.

**History: En. Sec. 2, Ch. 228, L. 1967; R.C.M. 1947, 45-1502.**

**71-3-204. Federal tax lien — place of filing.** (1) Notices of liens upon real property for taxes payable to the United States and certificates and notices affecting the liens shall be filed in the office of the clerk and recorder of the county or counties in which the real property subject to a federal tax lien is situated.

(2) Notices of liens upon personal property, whether tangible or intangible, for taxes payable to the United States and certificates and notices affecting the liens shall be filed as follows:

(a) if the person against whose interest the tax lien applies is a corporation or a partnership whose principal executive office is in this state, as these entities are defined in the internal revenue laws of the United States, in the office of the secretary of state;

(b) in all other cases, in the office of the clerk and recorder of the county where the taxpayer resides at the time of filing of the notice of lien.

**History: En. Sec. 1, Ch. 228, L. 1967; R.C.M. 1947, 45-1501.**

**71-3-205. Duties of filing officer.** (1) If a notice of federal tax lien, a refiling of a notice of tax lien, or a notice of revocation of any certificate described in subsection (2) is presented to the filing officer and:

(a) he is the secretary of state, he shall cause the notice to be marked, held, and indexed in accordance with the provisions of 30-9-403(4) as if the notice were a financing statement within the meaning of the Uniform Commercial Code; or

(b) he is any other officer described in 71-3-204, he shall endorse thereon his identification and the date and time of receipt and forthwith file it alphabetically or enter it in an alphabetical index showing the name and address of the person named in the notice, the date and time of receipt, the serial number of the district director, and the total unpaid balance of the assessment appearing on the notice of lien.

(2) If a certificate of release, nonattachment, discharge, or subordination of any tax lien is presented to the secretary of state for filing he shall:

(a) cause a certificate of release or nonattachment to be marked, held, and indexed as if the certificate were a termination statement within the meaning of the Uniform Commercial Code, except that the notice of lien to which the certificate relates shall not be removed from the files; and

(b) cause a certificate of discharge or subordination to be held, marked, and indexed as if the certificate were a release of collateral within the meaning of the Uniform Commercial Code.

(3) If a refiled notice of federal tax lien referred to in subsection (1) or any of the certificates or notices referred to in subsection (2) is presented for filing with any other filing officer specified in 71-3-204, he shall permanently attach the refiled notice or the certificate to the original notice of lien and shall enter the refiled notice or the certificate with the date of filing in any alphabetical federal tax lien index on the line where the original notice of lien is entered.

(4) Upon request of any person, the filing officer shall issue his certificate showing whether there is on file, on the date and hour stated therein, any notice of federal tax lien or certificate or notice affecting the lien, filed on or after July 1, 1967, naming a particular person, and if a notice or certificate is on file, giving the date and hour of filing of each notice or certificate.

(5) The fee for a certificate is $2. Upon request, the filing officer shall furnish a copy of any notice of federal tax lien or notice or certificate affecting a federal tax lien for a fee of $1 per page.

**History: En. Sec. 3, Ch. 228, L. 1967; R.C.M. 1947, 45-1503.**

**71-3-206. Fees.** (1) The fee for filing and indexing each notice of lien or certificate or notice affecting the tax lien is:
(a) for a tax lien on real estate, $2;
(b) for a tax lien on tangible and intangible personal property, $2;
(c) for a certificate of discharge or subordination, $1;
(d) for all other notices, including a certificate of release or nonattachment, $2.
(2) The officer shall bill the district directors of internal revenue on a monthly basis for fees for documents filed by them.

**History: En. Sec. 4, Ch. 228, L. 1967; R.C.M. 1947, 45-1504.**

**71-3-207. Prior filings of tax liens and notices.** Filing officers with whom notices of federal tax liens, certificates, and notices affecting such liens have been filed on or before July 1, 1967, shall, after that date, continue to maintain a file labeled "federal tax lien notices filed prior to July 1, 1967", containing notices and certificates filed in numerical order of receipt. If a notice of lien was filed on or before July 1, 1967, any certificate or notice affecting the lien shall be filed in the same office.

**History: En. Sec. 9, Ch. 228, L. 1967; R.C.M. 1947, 45-1507.**

## Part 3

## Liens for Salaries and Wages

**71-3-301. Priority when assignment of property made.** In all assignments of property made by any person to trustees or assignees on account of the inability of the person, at the time of the assignment, to pay his debts or in proceedings of insolvency, the wages of the miners, mechanics, salesmen, servants, clerks, or laborers employed by such person, to the amount actually owed and for services rendered within the previous 4 months, are preferred claims and must be paid by such trustees or assignees before any other creditor of the assignor.

**History: En. Sec. 2050, 5th Div. Comp. Stat. 1887; amd. Sec. 2150, C. Civ. Proc. 1895; re-en. Sec. 7302, Rev. C. 1907; re-en. Sec. 8351, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1204; re-en. Sec. 8351, R.C.M. 1935; amd. Sec. 1, Ch. 109, L. 1943; R.C.M. 1947, 45-601.**

**71-3-302. Priority in case of death of employer.** In case of the death of any employer, the wages of each miner, mechanic, salesperson, clerk, servant, and laborer for services rendered within 4 months next preceding the death of the employer, in the amount actually owed, are preferred debts under 72-3-807(1)(e) and must be paid before other claims against the estate of the deceased person.

**History: En. Sec. 2051, 5th Div. Comp. Stat. 1887; re-en. Sec. 2151, C. Civ. Proc. 1895; re-en. Sec. 7303, Rev. C. 1907; re-en. Sec. 8353, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1205; re-en. Sec. 8353, R.C.M. 1935; amd. Sec. 2, Ch. 109, L. 1943; amd. Sec. 3, Ch. 263,L. 1975; amd. Sec. 25, Ch. 535, L. 1975; R.C.M. 1947, 45-603.**

**71-3-303. Priority in cases of execution or attachment.** In case of executions, attachments, and writs of similar nature issued against any person, except for claims for labor done, any miners, mechanics, salesmen, servants, clerks, or laborers who have claims against the defendant for labor done may give notice of their claims and the amount thereof, sworn to by the person making the claim, to the parties plaintiff and defendant to the action in which such execution, attachment, or other writ has been issued and upon the officer executing the same. Service of notice herein required may be made upon the officer charged with the execution of such writ in one or more cases that may be pending against such person, who shall forthwith serve such notice and claim, by copy, upon the parties plaintiff and defendant, if found in the county where such action is pending, or upon their respective attorneys employed in such case or cases pending.

**History: En. Sec. 2052, 5th Div. Comp. Stat. 1887; re-en. Sec. 2152, C. Civ. Proc. 1895; re-en. Sec. 7304, Rev. C. 1907; re-en. Sec. 8354, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1206; re-en. Sec. 8354, R.C.M. 1935; R.C.M. 1947, 45-604.**

**71-3-304. Service of notice.** (1) The officer serving said notice and claim shall forthwith, after service of the same, make return thereof showing such service, where and how made.

(2) Service may be made in any case at any time before the actual sale of the property levied upon in such pending action, and unless such claim is disputed by the debtor or a creditor or party plaintiff, such officer must pay such person out of the proceeds of the sale the amount he is entitled to receive for services rendered within the 4 months next preceding the levy of the writ, not exceeding the amount actually owed.

**History: En. 2052, 5th Div. Comp. Stat. 1887; amd. Sec. 2153, C. Civ. Proc. 1895; re-en. Sec. 7305, Rev. C. 1907; re-en. Sec. 8355, R.C.M. 1921; re-en. Sec. 8355, R.C.M. 1935; amd. Sec. 3, Ch. 109, L. 1943; R.C.M. 1947, 45-605(part).**

**71-3-305. Proceeding if claim disputed.** (1) If any or all of the claims so presented and claiming preference under this part are disputed by either the debtor or a creditor, the person presenting the same must commence an action within 10 days after notice of such dispute is served upon such claimant, as provided in subsection (2), for the recovery thereof. The officer must retain possession of so much of the proceeds of the sale as may be necessary to satisfy such claim and costs until the final determination of such action. In case judgment be had, the costs are a preferred claim, which may include a reasonable attorney's fee.

(2) The debtor or creditor intending to dispute any claim presented under the provisions of 71-3-303 shall, within 10 days after receiving notice of such claim, serve upon the claimant and officer holding such execution, attachment, or other writ a statement in writing, verified by the oath of the debtor or person disputing such claim for services, setting forth that no part of said claim, not exceeding a sum specified, is justly due from the debtor to the claimant for services rendered within the 4 months next preceding the levy of the execution, attachment, or other writ, as the case may be.

(3) If the claimant brings suit on a claim which is disputed in part only and fails to recover a sum exceeding that which was admitted to be due, he shall not recover costs, but costs shall be adjudged against him. Where such claimant fails to bring suit upon his claim, which is disputed in part only, he shall be deemed to have waived that portion of his claim disputed.

**History: (1)En. 2052, 5th Div. Comp. Stat. 1887; amd. Sec. 2153, C. Civ. Proc. 1895; re-en. Sec. 7305, Rev. C. 1907; re-en. Sec. 8355, R.C.M. 1921; re-en. Sec. 8355, R.C.M. 1935; amd. Sec. 3, Ch. 109, L. 1943; Sec. 45-605, R.C.M. 1947; (2), (3)En. Sec. 2053, 5th Div. Comp. Stat. 1887; re-en. Sec. 2154, C. Civ. Proc. 1895; re-en. Sec. 7306, Rev. C. 1907; re-en. Sec. 8356, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1207; re-en. Sec. 8356, R.C.M. 1935; amd. Sec. 4, Ch. 109, L. 1943; Sec. 45-606, R.C.M. 1947; R.C.M. 1947, 45-605(part), 45-606.**

**71-3-306. Preferred claims — no dismissal of original action without consent.** Persons having the preferred claims mentioned in this part are entitled to a lien upon the property attached or levied upon, and if said claims are not disputed or if a judgment is recovered for the same, the officer must pay such claims out of the property, and the original action cannot be dismissed without the consent of the owners of such preferred claims.

**History: En. Sec. 2155, C. Civ. Proc. 1895; re-en. Sec. 7307, Rev. C. 1907; re-en. Sec. 8357, R.C.M. 1921; re-en. Sec. 8357, R.C.M. 1935; R.C.M. 1947, 45-607.**

**71-3-307. Liens not affected prior to four months of claim.** Nothing in this part shall be construed so as to affect any lien, encumbrance, or mortgage held by any creditor of such employer prior to said 4 months.

**History: En. Sec. 2054, 5th Div. Comp. Stat. 1887; re-en. Sec. 2156, C. Civ. Proc. 1895; re-en. Sec. 7308, Rev. C. 1907; re-en. Sec. 8358, R.C.M. 1921; re-en. Sec. 8358, R.C.M. 1935; amd. Sec. 5, Ch. 109, L. 1943; R.C.M. 1947, 45-608.**

## Part 4

## Farm Laborers' Liens

**71-3-401. Who may have lien — priority.** (1) Any person who performs services for another in the capacity of a farm or ranch laborer shall have a lien on all crops of every kind grown, raised, or harvested by the person for whom the services were performed during said time, as security for the payment of any wages due or owing to such persons for services so performed.

(2) Said lien shall have priority over all other liens, chattel mortgages, or encumbrances except, however, feed sufficient for 3 months for 1 horse, 2 cows and their calves, 4 hogs, and 50 domestic fowls, seed grain and threshers' liens. The wages for which a lien may be claimed shall not be in excess of $100 or for a period of time exceeding 60 days next preceding the date of filing the lien. In case any such person without cause quits his employment before the expiration of the time for which he is employed, then he shall not be entitled to a lien as herein provided.

(3) If several persons have or obtain liens under the provisions of this part against property of the same employer, they shall have no priority among themselves but all must be paid pro rata from the proceeds of any foreclosure sale according to the provisions of this part.

**History: (1), (2)En. Sec. 1, Ch. 196, L. 1935; re-en. Sec. 8374.1, R.C.M. 1935; Sec. 45-901, R.C.M. 1947; (3)En. Sec. 4, Ch. 196, L. 1935; re-en. Sec. 8374.4, R.C.M. 1935; Sec. 45-904, R.C.M. 1947; R.C.M. 1947, 45-901, 45-904.**

**71-3-402. How lien obtained.** In order to acquire a lien, as specified in 71-3-401, the person performing such services shall, within 30 days after the services are fully performed, file in the office of the clerk and recorder in the county in which any of the real estate is situated on which any crop is grown, upon which a lien is claimed, a statement verified by affidavit of the person claiming such lien, his duly authorized agent, or attorney having knowledge of the facts, setting forth the terms of employment, the name of the employer, the time when the services were commenced and when ended, the wages agreed upon, if any, and if not agreed upon then the reasonable value of the same, the terms of payment, if any, and a description of the real estate on which any crop is grown or has been grown or harvested on which a lien is claimed, the amount paid him, if any, and the amount remaining unpaid and that said laborer claims a lien for the same and the address to which notice shall be directed as required by 71-3-404.

**History: En. Sec. 2, Ch. 196, L. 1935; re-en. Sec. 8374.2, R.C.M. 1935; R.C.M. 1947, 45-902.**

**71-3-403. Filing — fee.** It shall be the duty of the clerk and recorder to file and enter said verified statement, and he shall be entitled to a fee of 50 cents for filing the same.

**History: En. Sec. 3, Ch. 196, L. 1935; re-en. Sec. 8374.3, R.C.M. 1935; R.C.M. 1947, 45-903.**

**71-3-404. Notice to other lienholders.** (1) Every person intending to foreclose a lien secured under the provisions of this part must give a written notice to the owner or the person against whom the lien is claimed and all chattel mortgagees, encumbrancers, and all other lienholders who appear on record in the office of the county clerk and recorder that in not less than 10 days from the date of said lien notice he will institute proceedings for the foreclosure of his lien, and all other labor lienholders to whom notice is given shall have the right to join in said foreclosure proceedings and be entitled to a pro rata share of the proceeds of the foreclosure sale, as hereinafter provided. However, if the notified labor lienholders do not join in said proceedings, they shall not be entitled to share pro rata in the proceeds of the sale.

(2) The lien notice required herein must be given by registered or certified mail and directed to the last-known address of the owner or the person against whom the lien is claimed and to the addresses of the chattel mortgagees, encumbrancers, and all other lienholders as their addresses appear of record. The return of the foreclosure sale must be accompanied by due proof of the giving of such notice as required to be given herein.

**History: En. Sec. 5, Ch. 196, L. 1935; re-en. Sec. 8374.5, R.C.M. 1935; R.C.M. 1947, 45-905.**

**71-3-405. Limitations of actions to foreclose liens.** All actions for the foreclosure and enforcement of the lien herein provided for must be commenced within 90 days from the filing of the lien.

**History: En. Sec. 10, Ch. 196, L. 1935; re-en. Sec. 8374.10, R.C.M. 1935; R.C.M. 1947, 45-910.**

**71-3-406. Rules of practice.** (1) Except as otherwise provided in this part, the provisions of Title 25 are applicable to and constitute the rules of practice in the proceedings mentioned in this part.

(2) The provisions of Title 25 relative to new trials and appeals, except insofar as they are inconsistent with the provisions of this part, apply to the proceedings mentioned in this part.

**History: (1)En. Sec. 6, Ch. 196, L. 1935; re-en. Sec. 8374.6, R.C.M. 1935; Sec. 45-906, R.C.M. 1947; (2)En. Sec. 7, Ch. 196, L. 1935; re-en. Sec. 8374.7, R.C.M. 1935; Sec. 45-907, R.C.M. 1947; R.C.M. 1947, 45-906, 45-907.**

**71-3-407. Parties.** All persons interested in the matter in controversy or in property charged with the lien or having liens thereon may be made parties.

**History: En. Sec. 8, Ch. 196, L. 1935; re-en. Sec. 8374.8, R.C.M. 1935; R.C.M. 1947, 45-908.**

**71-3-408. Acknowledgment of satisfaction of lien — penalty.** Whenever the indebtedness which is a lien upon any of such crops is paid and satisfied, it is the duty of the lienor to acknowledge satisfaction thereof and to discharge the lien of record. If any lienor fails to acknowledge satisfaction and discharge said lien within 30 days after being requested to do so by a person having a property interest in such crops, he is liable to any person injured thereby in the amount of such injury and costs of action.

**History: En. Sec. 11, Ch. 196, L. 1935; re-en. Sec. 8374.11, R.C.M. 1935; amd. Sec. 11-126, Ch. 264, L. 1963; R.C.M. 1947, 45-911.**

## Part 5

## Mechanics' Liens

**71-3-501. Who may have lien.** Every mechanic, miner, machinist, architect, foreman, engineer, builder, lumberman, artisan, workman, laborer, and any other person performing any work and labor upon, or furnishing any material, machinery, or fixture for, any building, structure, bridge, flume, canal, ditch, aqueduct, mining claim, coal mine, quartz lode, tunnel, city or town lot, farm, ranch, fence, railroad, telegraph, telephone, electric light, gas, or waterworks or plant or any improvements, upon complying with the provisions of this part, for his work or labor done or material, machinery, or fixtures furnished has a lien upon the property upon which the work or labor is done or material is furnished.

**History: En. Sec. 1, p. 332, Bannack Stat.; amd. Sec. 1, p. 509, Cod. Stat. 1871; re-en. Sec. 820, 5th Div. Rev. Stat. 1879; amd. Sec. 1370, 5th Div. Comp. Stat. 1887; amd. Sec. 2130, C. Civ. Proc. 1895; re-en. Sec. 7290, Rev. C. 1907; re-en. Sec. 8339, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1183; amd. Sec. 1, Ch. 23, L. 1925; re-en. Sec. 8339, R.C.M. 1935; amd. Sec. 1, Ch. 408, L. 1971; R.C.M. 1947, 45-501.**

**71-3-502. Priorities.** (1) All liens for any work or labor done or materials furnished upon the same premises, which shall be filed within 30 days after the filing of the first lien on such premises, shall entitle the holders thereof to share equally pro rata, according to the amount of their respective liens, in the proceeds arising from the sale of such premises upon the foreclosure of such liens.

(2) If, after the expiration of 30 days, other liens are filed against such premises, then all liens filed within 60 days after the filing of such subsequent lien are liens of the second class and share pro rata in any proceeds arising from the sale of the premises which may remain after all liens of the first class have been paid.

(3) The liens for work or labor done or material furnished, as specified in this part, shall be prior to and have precedence over any mortgage, encumbrance, or other lien made subsequent to the commencement of work on any contract for the erection of such building, structure, or other improvement.

(4) The liens attach to the buildings, structures, or improvements for which they were furnished or the work was done in preference to any prior lien, encumbrance, or mortgage upon the land upon which said buildings, structures, or improvements are erected; and any person enforcing such lien may sell the same under execution, and the purchaser may remove the property sold within a reasonable time thereafter.

**History: (1) thru (3)En. Secs. 8 and 9, p. 334, Bannack Stat.; re-en. Secs. 8 and 9, p. 511, Cod. Stat. 1871; amd. Secs. 1 and 2, p. 238, L. 2877; re-en. Sec. 827, 5th Div. Rev. Stat. 1879; amd. Sec. 1374, 5th Div. Comp. Stat. 1887; amd. Sec. 2, p. 71, Ex. L. 1887; en. Sec. 2133, C. Civ. Proc. 1895; re-en. Sec. 7293, Rev. C. 1907; re-en. Sec. 8342, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1185; re-en. Sec. 8342, R.C.M. 1935; Sec. 45-504, R.C.M. 1947; (4)En. Sec. 10, p. 34, Bannack Stat.; re-en. Sec. 10, p. 511, Cod. Stat. 1871; amd. Sec. 3, p. 238, L. 1877; amd. Sec. 829, 5th Div. Rev. Stat. 1879; amd. Sec. 1376, 5th Div. Comp. Stat. 1887; amd. Sec. 2135, C. Civ. Proc. 1895; re-en. Sec. 7295, Rev. C. 1907; re-en. Sec. 8344, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1186; re-en. Sec. 8344, R.C.M. 1935; Sec. 45-506, R.C.M. 1947; R.C.M. 1947, 45-504(part), 45-506.**

**71-3-503. Who deemed owners.** Every person, including guardians of minors, married persons, and any company, association, or corporation, not a tenant or lessee, for whose use, benefit, or enjoyment any property, building, structure, or improvement mentioned in this part is constructed, repaired, or altered is deemed the owner thereof for the purposes of this part.

**History: En. Sec. 1387, 5th Div. Comp. Stat. 1887; amd. Sec. 3, p. 72, Ex. L. 1887; amd. Sec. 2140, C. Civ. Proc. 1895; re-en. Sec. 7300, Rev. C. 1907; re-en. Sec. 8349, R.C.M. 1921; re-en. Sec. 8349, R.C.M. 1935; amd. Sec. 24, Ch. 535, L. 1975; R.C.M. 1947, 45-511.**

**71-3-504. Parties.** All persons interested in the matter in controversy or in property charged with the lien or having liens thereon may be made parties.

**History: En. Sec. 2138, C. Civ. Proc. 1895; re-en. Sec. 7298, Rev. C. 1907; re-en. Sec. 8347, R.C.M. 1921; re-en. Sec. 8347, R.C.M. 1935; R.C.M. 1947, 45-509.**

**71-3-505. Limitation on actions.** All actions under this part must be commenced within 2 years from the date of the filing of the lien.

**History: En. Sec. 2139, C. Civ. Proc. 1895; re-en. Sec. 7299, Rev. C. 1907; amd. Sec. 1, Ch. 127, L. 1921; re-en. Sec. 8348, R.C.M. 1921; re-en. Sec. 8348, R.C.M. 1935; R.C.M. 1947, 45-510.**

**71-3-506 through 71-3-510 reserved.**

**71-3-511. How to perfect lien.** (1) Every person wishing to avail himself of the benefits of this part must file, with the county clerk of the county in which the property or premises mentioned in 71-3-501 is situated and within 90 days after the material or machinery aforesaid has been furnished or the work or labor performed, a just and true account of the amount due him, after allowing all credits, containing a correct description of the property to be charged with such lien, verified by affidavit, but any error or mistake in the account or description does not affect the validity of the lien if the property can be identified by the description. The paper containing the account, description, and affidavit is deemed the lien. When there is an open account between the parties for labor, material, or machinery, such lien may be filed within 90 days after the date of the last item in such account and include all items and charges contained therein for material or machinery furnished for, or work performed on, the property on which the lien is claimed.

(2) The time within which to perfect the lien by filing of the notice of lien is shortened if the provisions of 71-3-512 are complied with and a notice of completion is timely filed, in which event such notice of lien must be filed within 60 days immediately following the first publication of the notice of completion.

**History: En. Sec. 6, p. 333, Bannack Stat.; amd. Sec. 6, p. 510, Cod. Stat. 1871; amd. Sec. 1, p. 84, L. 1874; re-en. Sec. 825, 5th Div. Rev. Stat. 1879; amd. Sec. 1371, 5th Div. Comp. Stat. 1887; amd. Sec. 1, p. 71, Ex. L. 1887; amd. Sec. 2131, C. Civ. Proc. 1895; En. Sec. 1, p. 162, L. 1901; re-en. Sec. 7291, Rev. C. 1907; re-en. Sec. 8340, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1187; re-en. Sec. 8340, R.C.M. 1935; amd. Sec. 2, Ch. 408, L. 1971; R.C.M. 1947, 45-502(1), (2).**

**71-3-512. Notice of completion.** (1) The owner may file a notice of completion at any time after the completion of any work or improvement.

(2) The following acts or events constitute completion of any work or improvement for the purpose of filing a notice of completion:

(a) the written acceptance by the owner, his agent, or representative of the building, improvement, or structure. The filing of a notice of completion shall not be considered as an acceptance of the building, improvement, or other structure.

(b) the cessation from labor for 30 days upon any building, improvement, or structure, or the alteration, addition to, or repair thereof.

(3) The notice of completion together with an affidavit of publication as hereinafter required shall be filed in the office of the county clerk and recorder of the county where the property is situated and the notice shall set forth:

(a) the date when the work or improvement was completed or the date on which cessation from labor occurred first and the period of its duration;

(b) the owner's name or owners' names, as the case may be, the address of the owner or addresses of the owners, as the case may be, and the nature of the title, if any, of the person signing the notice;

(c) a description of the property sufficient for identification;

(d) the name of the contractor, if any.

(4) The notice shall be verified by the owner or his agent.

(5) A copy of the notice of completion shall be published once each week for 3 successive weeks in a newspaper of general circulation in the county where the land on which the work or improvement was performed is situated.

**History: (1), (3) thru (5)En. Sec. 3, Ch. 408, L. 1971; Sec. 45-502.1, R.C.M. 1947; (2)En. Sec. 6, p. 333, Bannack Stat.; amd. Sec. 6, p. 510, Cod. Stat. 1871; amd. Sec. 1, p. 84, L. 1874; re-en. Sec. 825, 5th Div. Rev. Stat. 1879; amd. Sec. 1371, 5th Div. Comp. Stat. 1887; amd. Sec. 1, p. 71, Ex. L. 1887; amd. Sec. 2131, C. Civ. Proc. 1895; En. Sec. 1, p. 162, L. 1901; re-en. Sec. 7291, Rev. C. 1907; re-en. Sec. 8340, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1187; re-en. Sec. 8340, R.C.M. 1935; amd. Sec. 2, Ch. 408, L. 1971; Sec. 45-502, R.C.M. 1947; R.C.M. 1947, 45-502(3), 45-502.1.**

**71-3-513. Filing with county clerk.** The county clerk must endorse upon every lien the day of its filing and make an abstract thereof in a book by him to be kept for that purpose and properly indexed, containing the date of the filing, the name of the person holding the lien, the amount thereof, the name of the person against whose property the lien is filed, and the description of the property to be charged with same.

**History: En. Sec. 7, p. 333, Bannack Stat.; re-en. Sec. 7, p. 510, Cod. Stat. 1871; amd. Sec. 2, p. 84, L. 1874; re-en. Sec. 826, 5th Div. Rev. Stat. 1879; re-en. Sec. 1373, 5th Div. Comp. Stat. 1887; amd. Sec. 2132, C. Civ. Proc. 1895; re-en. Sec. 7292, Rev. C. 1907; re-en. Sec. 8341, R.C.M. 1921; re-en. Sec. 8341, R.C.M. 1935; R.C.M. 1947, 45-503.**

**71-3-514. What property affected.** (1) The lien given extends to the lot or land upon which any such building, improvement, or structure is situated, to the extent of 1 acre, if outside of any town or city or, if within any town or city, then to the extent of the whole lot or lots upon which the same is situated, if the land belonged to the person who caused said building to be constructed, altered, or repaired; but if such person owned less than a fee-simple estate in such land, then only his interest therein is subject to such lien.

(2) When the interest in the land, building, structure, or other improvement is a leasehold interest, the forfeiture of such lease does not forfeit or impair such liens so far as concerns the buildings, structures, and improvements put thereon by the persons charged with such lien, but the same may be sold to satisfy said lien and may be removed by the purchaser within 20 days after the sale thereof.

**History: (1)En. Secs. 8 and 9, p. 334, Bannack Stat.; re-en. Secs. 8 and 9, p. 511, Cod. Stat. 1871; amd. Secs. 1 and 2, p. 238, L. 1877; re-en. Sec. 827, 5th Div. Rev. Stat. 1879; amd. Sec. 1374, 5th Div. Comp. Stat. 1887; amd. Sec. 2, p. 71, Ex. L. 1887; en. Sec. 2133, C. Civ. Proc. 1895; re-en. Sec. 7293, Rev. C. 1907; re-en. Sec. 8342, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1185; re-en. Sec. 8342, R.C.M. 1935; Sec. 45-504, R.C.M. 1947; (2)En. Sec. 9, p. 334, Bannack Stat.; re-en. Sec. 9, p. 511, Cod. Stat. 1871; re-en. Sec. 828, 5th Div. Rev. Stat. 1879; re-en. Sec.**

**1375, 5th Div. Comp. Stat. 1887; amd. Sec. 2134, C. Civ. Proc. 1895; re-en. Sec. 7294, Rev. C. 1907; re-en. Sec. 8343, R.C.M. 1921; re-en. Sec. 8343, R.C.M. 1935; Sec. 45-505, R.C.M. 1947; R.C.M. 1947, 45-504(part), 45-505.**

**71-3-515. Acknowledgment of satisfaction of lien — penalty.** Whenever any indebtedness which is a lien upon any such real estate, structure, building, or other improvement is paid and satisfied, it is the duty of the creditors to acknowledge satisfaction thereof as in case of a mortgage; and if any creditor fails to acknowledge satisfaction, as aforesaid, he is liable to any person injured by such failure to the amount of such injury and the costs of action.

**History: En. Sec. 841, 5th Div. Rev. Stat. 1879; re-en. Sec. 1385, 5th Div. Comp. Stat. 1887; amd. Sec. 2141, C. Civ. Proc. 1895; re-en. Sec. 7301, Rev. C. 1907; re-en. Sec. 8350, R.C.M. 1921; re-en. Sec. 8350, R.C.M. 1935; R.C.M. 1947, 45-512.**

**71-3-516. Substitution of bond allowed — filing — amount — condition.** (1) Whenever a mechanic's lien has been filed upon real property or any improvements thereon, as enumerated in 71-3-501, the owner of any interest in such property, whether legal or beneficial, may, at any time before the lien claimant has commenced an action to foreclose such lien, file a bond with the clerk of the district court in the county in which such property is situated or, if such property is situated in more than one county, with the clerk of the district court of any county in which a part of such property is situated.

(2) Such bond shall be in an amount 1 ½ times the amount of the lien and shall be either in cash or written by a corporate surety company. If written by a corporate surety, such bond shall be approved by a judge of the district court with which such bond is filed.

(3) The bond shall be conditioned that if the lien claimant shall be finally adjudged to be entitled to recover upon the claim upon which his lien is based, the principal or his sureties shall pay to such claimant the amount of his judgment, together with any interest, costs, attorneys' fees, and other sums which such claimant would be entitled to recover upon the foreclosure of a lien against the principal.

**History: En. Sec. 1, Ch. 338, L. 1971; R.C.M. 1947, 45-513.**

**71-3-517. Lien discharged upon filing of bond.** Upon the filing of a bond as provided in 71-3-516, the lien against the real property shall forthwith be discharged and released in full and the bond shall be substituted for such lien.

**History: En. Sec. 2, Ch. 338, L. 1971; R.C.M. 1947, 45-514.**

**71-3-518. Action upon bond — period of limitation same.** (1) When a bond is filed as provided in 71-3-516, the person filing such lien may bring an action upon the bond.

(2) Such action shall be commenced within the time allowed for the commencement of an action upon foreclosure of a lien, and the statute of limitations applicable to a lien foreclosure shall apply to an action upon such bond as it would had no bond been filed.

**History: En. Sec. 3, Ch. 338, L. 1971; R.C.M. 1947, 45-515.**

**71-3-519. Rules of practice.** (1) Except as otherwise provided in this part, the provisions of Title 25 are applicable to and constitute the rules of practice in the proceedings mentioned in this part.

(2) The provisions of Title 25 relative to new trials and appeals, except insofar as they are inconsistent with the provisions of this part, apply to the proceedings mentioned in this part.

**History: (1)En. Sec. 2136, C. Civ. Proc. 1895; re-en. Sec. 7296, Rev. C. 1907; re-en. Sec. 8345, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1198; re-en. Sec. 8345,**

**R.C.M. 1935; Sec. 45-507, R.C.M. 1947; (2)En. Sec. 2137, C. Civ. Proc. 1895; re-en. Sec. 7297, Rev. C. 1907; re-en. Sec. 8346, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1199; re-en. Sec. 8346, R.C.M. 1935; Sec. 45-508, R.C.M. 1947; R.C.M. 1947, 45-507, 45-508.**

## Part 6

## Loggers' Liens

**71-3-601. Definition of lumber — who may have lien.** (1) The term "lumber", as used in this part, shall be held and be construed to mean all logs or other timber sawed or split for use, including beams, joists, planks, boards, shingles, laths, staves, hoops, and every article of whatsoever nature or description manufactured from sawlogs or other timber.

(2) Every person, general partnership, limited partnership, corporation, or association performing labor upon, or who shall assist in obtaining or securing sawlogs, piling, railroad ties, cordwood, or other timber, has a lien upon the same and upon all other sawlogs, piling, railroad ties, cordwood, or other timber which, at the time of the filing of the claim or lien hereinafter provided, belonged to the person or corporation for whom the labor was performed, for the work or labor done upon or in obtaining or securing the particular sawlogs, piling, railroad ties, cordwood, or other timber in said claim or lien described, whether such work or labor was done at the instance of the owner of the same or his agent or a contractor or subcontractor or any person in behalf of such owner or his agent or a contractor or subcontractor. The cook in a logging camp shall be regarded as a person who assists in obtaining or securing any of the timber herein mentioned.

(3) Every person performing work or labor or assisting in manufacturing sawlogs and other timber into lumber and shingles has a lien upon such lumber while the same remains at the mill where it was manufactured or in the possession or under the control of the manufacturer, whether such work or labor was done at the instance of the owner of such logs or his agent or any contractor or subcontractor of such owner.

(4) Any person who shall permit another to go upon his timberland and cut thereon sawlogs, piling, railroad ties, cordwood, or other timber has a lien upon the same for the price agreed to be paid for such privilege or for the price such privilege would be reasonably worth in case there was no express agreement fixing the price.

**History: (1), (3)En. Sec. 2, p. 127, L. 1899; re-en. Sec. 5820, Rev. C. 1907; re-en. Sec. 8319, R.C.M. 1921; re-en. Sec. 8319, R.C.M. 1935; Sec. 45-402, R.C.M. 1947; (2)En. Sec. 1, p. 126, L. 1899; re-en. Sec. 5819, Rev. C. 1907; amd. Sec. 1, Ch. 60, L. 1909; re-en. Sec. 8318, R.C.M. 1921; Cal. Civ. C. Sec. 3065; re-en. Sec. 8318, R.C.M. 1935; amd. Sec. 1, Ch. 59, L. 1967; Sec. 45-401, R.C.M. 1947; (4)En. Sec. 3, p. 127, L. 1899; re-en. Sec. 5821, Rev. C. 1907; re-en. Sec. 8320, R.C.M. 1921; re-en. Sec. 8320, R.C.M. 1935; Sec. 45-403, R.C.M. 1947; R.C.M. 1947, 45-401, 45-402, 45-403.**

**71-3-602. Priority.** The liens provided for in this part are preferred liens and prior to any other liens, and no sale or transfer of any sawlogs, piling, railroad ties, cordwood, or other timber or manufactured lumber or shingles shall divest the lien thereon as herein provided, and as between liens provided for in this part, those for work and labor shall be preferred. As between liens for work and labor claimed by several laborers on the same logs or lot of logs, the claims for work and labor done or performed on the identical logs proceeded against to the extent that said logs can be identified shall be preferred as against the general claims of liens for work and labor recognized and provided for in this part.

**History: En. Sec. 4, p. 127, L. 1899; re-en. Sec. 5822, Rev. C. 1907; re-en. Sec. 8321, R.C.M. 1921; re-en. Sec. 8321, R.C.M. 1935; R.C.M. 1947, 45-404.**

**71-3-603. Extent of liens.** (1) The person rendering the service or doing the work or labor named in 71-3-601(1) through (3) is only entitled to the liens as provided herein for services, work, or labor for the period of 3 calendar months, or any part thereof next preceding the filing of the claim, as provided in 71-3-606.

(2) The person granting the privilege mentioned in 71-3-602(4) is only entitled to the lien as provided therein for sawlogs, piling, railroad ties, cordwood, or other timber cut during the 3 months next preceding the filing of the claim, as provided in 71-3-605.

**History: (1)En. Sec. 5, p. 128, L. 1899; re-en. Sec. 5823, Rev. C. 1907; re-en. Sec. 8322, R.C.M. 1921; re-en. Sec. 8322, R.C.M. 1935; Sec. 45-405, R.C.M. 1947; (2)En. Sec. 6, p. 128, L. 1899; re-en. Sec. 5824, Rev. C. 1907; re-en. Sec. 8323, R.C.M. 1921; re-en. Sec. 8323, R.C.M. 1935; Sec. 45-406, R.C.M. 1947; R.C.M. 1947, 45-405, 45-406.**

**71-3-604. Duration of lien.** No lien provided for in this part binds any sawlogs, piling, railroad ties, cordwood, or other timber or lumber and shingles for a longer period than 8 calendar months after the claim as herein provided has been filed, unless a civil action be commenced in a proper court within that time to enforce the same. However, in case such civil action so commenced should for any cause, other than the merits, be dismissed, then the lien shall continue for the term of 1 calendar month, if the 8 months have expired to permit the commencement of another action thereon, which shall be as effective in prolonging the lien as if it had been entered during the term of 8 months hereinbefore stated.

**History: En. Sec. 10, p. 129, L. 1899; re-en. Sec. 5828, Rev. C. 1907; re-en. Sec. 8327, R.C.M. 1921; re-en. Sec. 8327, R.C.M. 1935; R.C.M. 1947, 45-410.**

**71-3-605. How to obtain lien — form of claim.** (1) Every person, within 30 days after the close of the rendition of the services or after the close of the work or labor mentioned in 71-3-601, claiming the benefit hereof must file for record with the county in which such sawlogs, piling, railroad ties, cordwood, or other timber were cut or in which such lumber or shingles were manufactured a claim containing a statement of his demand and the amount thereof, after deducting as nearly as possible all just credits and offsets, with the name of the person by whom he was employed, with a statement of the terms and conditions of his contract, if any. In case there is no express contract, the claim shall state what such service, work, or labor is reasonably worth. It shall also contain a description of the property to be charged with a lien sufficient for identification with reasonable certainty, which claim must be verified by the oath of himself or some other person to the effect that the affiant believes the same to be true.

(2) The claim shall be substantially in the following form:

...., Claimant, vs. ....

Notice is hereby given that .... of .... County, state of Montana, claims a lien upon a .... of ...., being about .... in quantity, which were cut or manufactured in .... County, state of Montana, are marked thus ...., and are now lying in a .... for labor performed upon and assistance rendered in .... said ....; that the name of the owner or reputed owner is ....; that .... employed said .... to perform such labor and render such assistance upon the following terms and conditions, to wit: The said .... agreed to pay the said .... for such labor and assistance ....; that said contract has been faithfully performed and fully complied with on the part of said ...., who performed labor upon and assisted in .... said .... for a period of ....; that said labor and assistance were so performed and rendered upon said .... between the .... day of .... and the .... day of ...., and the rendition of said service was closed on the .... day of ...., and 30 days have not elapsed since that time; that the amount of claimant's demand for said services is ....; that no part thereof has been paid except ...., and there is now due and remaining unpaid thereon, after deducting all just credits and offsets, the sum of ...., in which amount he claims a lien upon said ....; that said .... also claims a lien on all said .... now owned by said .... of said county, to secure payment for the work and labor performed in obtaining or securing the said logs, piling, railroad ties, cordwood, or other timber, lumber, or shingles herein described.

...., Claimant.

State of Montana,

County of ....

...., being first duly sworn, on oath says that he is .... named in the foregoing claim, has heard the same read, and knows the contents thereof, and believes the same to be true.

...............

Subscribed and sworn to before me this .... day of ....

...............

**History: En. Sec. 7, p. 128, L. 1899; re-en. Sec. 5825, Rev. C. 1907; re-en. Sec. 8324, R.C.M. 1921; re-en. Sec. 8324, R.C.M. 1935; R.C.M. 1947, 45-407.**

**71-3-606. Claim for lien of landowner same.** Every person mentioned in 71-3-601(4), claiming the benefit must file for record with the county clerk of the county in which such sawlogs, piling, railroad ties, cordwood, or other timber were cut a claim in substance the same as provided in 71-3-605 and verified as therein provided.

**History: En. Sec. 8, p. 129, L. 1899; re-en. Sec. 5826, Rev. C. 1907; re-en. Sec. 8325, R.C.M. 1921; re-en. Sec. 8325, R.C.M. 1935; R.C.M. 1947, 45-408.**

**71-3-607. Immaterial defects in claim.** No mistake or error in the statement of the demand or of the amount of credits and offsets allowed or of the balance asserted to be due to claimant or in the description of the property against which the claim is filed shall invalidate the lien unless the court finds that such mistake or error in the statement of the demand, credits and offsets, or of the balance due was made with intent to defraud or the court shall find that an innocent third party without notice, actual or constructive, has, since the claim was filed, become a bona fide owner of the property subject to the lien and that the notice of claim was so deficient that it did not put the party upon further inquiry in any manner.

**History: En. Sec. 13, p. 130, L. 1899; re-en. Sec. 5831, Rev. C. 1907; re-en. Sec. 8330, R.C.M. 1921; re-en. Sec. 8330, R.C.M. 1935; R.C.M. 1947, 45-413.**

**71-3-608. Duties of county clerk.** The county clerk must file any claim presented under the provisions of this part, endorse thereon the time of receiving the same, and keep the same in his office for the inspection of all persons and shall enter in a book, properly ruled and kept for such purpose, the names of all the parties, such names to be alphabetically arranged, the amount of the lien, and the time of filing the same.

**History: En. Sec. 9, p. 129, L. 1899; re-en. Sec. 5827, Rev. C. 1907; re-en. Sec. 8326, R.C.M. 1921; re-en. Sec. 8326, R.C.M. 1935; R.C.M. 1947, 45-409.**

**71-3-609 and 71-3-610 reserved.**

**71-3-611. Enforcement of lien.** (1) The liens provided for in this part shall be enforced by a civil action in the district court of the county wherein the lien was filed and shall be governed by the laws regulating the proceedings in civil actions touching the mode and manner of trial and the proceedings and laws to secure property, so as to hold it for the satisfaction of any lien that may be against it.

(2) Any person who shall bring a civil action to enforce the lien provided for, any person having a lien as provided for, or who shall be made a party to any such civil action has the right to demand that such lien be enforced against the whole or any part of the sawlogs, piling, railroad ties, cordwood, or other timber or manufactured lumber or shingles upon which he has performed labor or which he has assisted in securing or obtaining or which he has cut on his timberland during the 3 months next preceding the filing of his lien, for all his labor upon or for all his assistance in obtaining or securing said sawlogs, piling, railroad ties, cordwood, or other timber or in manufacturing said lumber into shingles during the whole or any part of the 3 months mentioned in 71-3-605, or for timber cut during the whole or any part of the 3 months above mentioned.

(3) Where proceedings are commenced against any lot of sawlogs, piling, railroad ties, cordwood or other timber or lumber or shingles, as herein provided, and some of the lienors claim liens against these specific sawlogs, piling, railroad ties, cordwood, or other timber or lumber or shingles proceeded against and others against the same generally to secure their claim for work and labor, the priority of the liens shall be determined as hereinbefore provided.

**History: (1)En. Sec. 11, p. 130, L. 1899; re-en. Sec. 5829, Rev. C. 1907; re-en. Sec. 8328, R.C.M. 1921; re-en. Sec. 8328, R.C.M. 1935; Sec. 45-411, R.C.M. 1947; (2), (3)En. Sec. 12, p. 130, L. 1899; re-en. Sec. 5830, Rev. C. 1907; re-en. Sec. 8329, R.C.M. 1921; re-en. Sec. 8329, R.C.M. 1935; Sec. 45-412, R.C.M. 1947; R.C.M. 1947, 45-411, 45-412.**

**71-3-612. Requirements to be bona fide purchaser.** It shall be conclusively presumed by the court that a party purchasing the property subject to the lien within the 30 days given herein to claimants wherein to file their liens is not an innocent third party nor that he has become a bona fide owner of the property subject to the lien unless it shall appear that he has paid full value for the property and has seen that the purchase money of the property has been applied to the payment of such bona fide claims as are entitled to liens upon the same property under the provisions of this part, according to the priorities herein established.

**History: En. Sec. 14, p. 131, L. 1899; re-en. Sec. 5832, Rev. C. 1907; re-en. Sec. 8331, R.C.M. 1921; re-en. Sec. 8331, R.C.M. 1935; R.C.M. 1947, 45-414.**

**71-3-613. Parties.** Any number of persons claiming liens under this part may join in the affidavit in 71-3-605 and may join in the same action and when separate actions are commenced, the court may consolidate them.

**History: En. Sec. 15, p. 131, L. 1899; re-en. Sec. 5833, Rev. C. 1907; re-en. Sec. 8332, R.C.M. 1921; re-en. Sec. 8332, R.C.M. 1935; R.C.M. 1947, 45-415(part).**

**71-3-614. Judgment and execution.** In each civil action, judgment must be rendered in favor of each person having a lien for the amount due to him, and the court shall order any property subject to the lien to be sold by the sheriff of the proper county in the same manner that personal property is sold on execution, and the court shall apportion the proceeds of such sale to the payment of each judgment according to the priorities established in this part, pro rata in its class, according to the amount of such judgment.

**History: En. Sec. 16, p. 131, L. 1899; re-en. Sec. 5834, Rev. C. 1907; re-en. Sec. 8333, R.C.M. 1921; re-en. Sec. 8333, R.C.M. 1935; R.C.M. 1947, 45-416.**

**71-3-615. Sale of property to satisfy lien.** The court may order any property subject to a lien as provided in this part to be sold by the sheriff as personal property is sold on execution, either before or at the time judgment is rendered, as provided in 71-3-614, and the proceeds of such sale must be paid into court to be applied as directed in 71-3-614.

**History: En. Sec. 17, p. 132, L. 1899; re-en. Sec. 5835, Rev. C. 1907; re-en. Sec. 8334, R.C.M. 1921; re-en. Sec. 8334, R.C.M. 1935; R.C.M. 1947, 45-417.**

**71-3-616. Penalty for destroying means of identification of property.** Any person who shall eloign, injure, or destroy or who shall render difficult, uncertain, or impossible of identification any sawlogs, piling, railroad ties, cordwood, shingles, or other timber upon which there is a lien as herein provided, without the express consent of the person entitled to such lien, shall be liable to a lienholder for the damages to the amount secured by his lien, and it being shown to the court in a civil action to enforce said lien, it shall be the duty of the court to enter a personal judgment for the amount in such action against the person, provided he be a party to such action, or the damages may be recovered by a civil action against such person.

**History: En. Sec. 18, p. 132, L. 1899; re-en. Sec. 5836, Rev. C. 1907; re-en. Sec. 8335, R.C.M. 1921; re-en. Sec. 8335, R.C.M. 1935; R.C.M. 1947, 45-418.**

## Part 7

## Crop Liens for Seed or Grain and Liens for Hail Insurance

**71-3-701. Lien for seed or grain.** Any person, company, association, or corporation who shall furnish to another seed to be sown or planted or funds or means with which to purchase such seed to be sown or planted or to be used in the production or cultivation of a crop or crops on the lands owned or contracted to be purchased, used, leased, occupied, or rented by him or held under government entry shall, upon filing the statement provided for in 71-3-703, have a lien not exceeding the purchase price of 700 bushels upon the crop produced from the seed or grain so furnished, or any part thereof, and upon the seed or grain threshed from such crop to secure the payment of the amount or the value of the seed or grain so furnished or the funds or means advanced to purchase the same.

**History: En. Sec. 1, Ch. 23, L. 1915; amd. Sec. 1, Ch. 15, Ex. L. 1918; re-en. Sec. 8359, R.C.M. 1921; re-en. Sec. 8359, R.C.M. 1935; R.C.M. 1947, 45-701.**

**71-3-702. Priority.** The lien provided by 71-3-701 shall, as to the crop covered thereby, have priority over all other liens and encumbrances thereon.

**History: En. Sec. 3, Ch. 23, L. 1915; re-en. Sec. 3, Ch. 15, Ex. L. 1918; re-en. Sec. 8361, R.C.M. 1921; re-en. Sec. 8361, R.C.M. 1935; R.C.M. 1947, 45-703.**

**71-3-703. How to obtain lien.** Any person who is entitled to a lien under 71-3-701 shall, within 30 days after the seed or grain is furnished or the funds, means, or moneys advanced therefor, file in the office of the county clerk and recorder of the county in which such seed or grain is to be planted or used a statement in writing verified under oath showing the kind and quantity of the seed or grain furnished, its value, or the amount of the funds or money advanced to pay therefor, the name of the person or persons to whom furnished, and a description of the land and of each tract of land upon which the same is to be or has been planted or sown or used in the production of a crop. Unless the person entitled to such lien shall file such statement within the time aforesaid, he shall be deemed to have waived the right thereto.

**History: En. Sec. 2, Ch. 23, L. 1915; amd. Sec. 2, Ch. 15, Ex. L. 1918; re-en. Sec. 8360, R.C.M. 1921; re-en. Sec. 8360, R.C.M. 1935; R.C.M. 1947, 45-702.**

**71-3-704. Acknowledgment of satisfaction of lien — penalty.** Whenever the indebtedness which is a lien upon such grain or other crops is paid and satisfied, it is the duty of the lienor to acknowledge satisfaction thereof and to discharge the lien of record. If any lienor fails to acknowledge satisfaction and discharge of said lien as aforesaid within 30 days after being requested to do so by a person having a property interest in such grain or other crops, he is liable to any person injured thereby in the amount of such injury and the costs of the action.

**History: En. Sec. 4, Ch. 15, Ex. L. 1918; re-en. Sec. 8362, R.C.M. 1921; re-en. Sec. 8362, R.C.M. 1935; amd. Sec. 11-123, Ch. 264, L. 1963; R.C.M. 1947, 45-704.**

**71-3-705. Destruction of records — when allowed.** (1) All seed liens which have heretofore or shall hereafter be filed for record in the office of any county clerk and recorder of the several counties in the state shall be retained by such county clerk in a file kept by him for such purposes for a period of 8 years from the time when said seed lien has ceased to be a lien on the property described therein.

(2) Upon the expiration of the period of time specified in subsection (1), the county clerk and recorder may destroy all seed liens which have been preserved for the period of time specified in this section.

**History: (1)En. Sec. 1, Ch. 113, L. 1935; re-en. Sec. 4813.3, R.C.M. 1935; amd. Sec. 11-112, Ch. 264, L. 1963; Sec. 16-2922, R.C.M. 1947; (2)En. Sec. 2, Ch. 113, L. 1935; re-en. Sec. 4813.4, R.C.M. 1935; amd. Sec. 11-113, Ch. 264, L. 1963; Sec. 16-2923, R.C.M. 1947; R.C.M. 1947, 16-2922(part), 16-2923(part).**

**71-3-706 through 71-3-710 reserved.**

**71-3-711. Lien for hail insurance.** Any person, company, association, or corporation which shall furnish to another hail insurance for the purpose of protecting the party's crop from damage by hail during the hail season of the then-growing or seeded crop, whether the crop be on the land owned or contracted to be purchased, used, leased, occupied, or rented by the insured or held under government entry, shall, upon filing the statement provided for in 71-3-712, have a lien, subject to any seed lien that may then or thereafter be placed on record against the crop, for the amount due the person, company, association, or corporation furnishing the hail insurance from the insured so protected, whether it be on a note given, open account, or assessment, due or to become due, for the current year's protection, upon the crop produced on the land so protected or any part thereof and upon the seed or grain threshed from such crop to secure the payment of the amount due or the assessment levied against the insured for the insurance provided.

**History: En. Sec. 1, Ch. 223, L. 1921; re-en. Sec. 8363, R.C.M. 1921; re-en. Sec. 8363, R.C.M. 1935; R.C.M. 1947, 45-705.**

**71-3-712. How lien obtained.** Any person who is entitled to a lien under 71-3-711 shall, within 30 days after the insurance is issued, file in the office of the county clerk and recorder of the county in which the crop so insured is located a statement in writing verified under oath giving the description of the land upon which the crop is planted, together with the kind of crop insured; provided that with a mutual company it may file a lien for the largest amount that may become due under its assessment power, and in the event that the amount assessed shall not be as large as the amount of the lien claimed, then the amount assessed and due shall be the amount the mutual insurance company shall be entitled to under this lien. Unless the person, company, association, or corporation entitled to such a lien shall file such statement within the time aforesaid, he or it shall be deemed to have waived the right thereto.

**History: En. Sec. 2, Ch. 223, L. 1921; re-en. Sec. 8364, R.C.M. 1921; re-en. Sec. 8364, R.C.M. 1935; R.C.M. 1947, 45-706.**

**71-3-713. Acknowledgment of satisfaction of lien — penalty.** Whenever the indebtedness, which is a lien upon such grain or other crops, is paid or satisfied on or before November 1 of the current year, it is the duty of the lienor to acknowledge satisfaction thereof within 20 days after receiving payment and to discharge the lien of record. If any lienor fails to acknowledge satisfaction and discharge of said lien as aforesaid, he is liable to any person injured thereby in the amount of such injury and the costs of action. If any hail lien is not satisfied on or before March 1 of the next succeeding year after the insurance was carried on the crop, the same shall be deemed satisfied and released of record.

**History: En. Sec. 3, Ch. 223, L. 1921; re-en. Sec. 8365, R.C.M. 1921; re-en. Sec. 8365, R.C.M. 1935; amd. Sec. 11-124, Ch. 264, L. 1963; R.C.M. 1947, 45-707.**

## Part 8

## Threshers' Liens

**71-3-801. Who may have lien — amount.** (1) All threshermen or swathers owning or operating threshing or swathing machines and all owners of combine harvesters and threshers shall have a lien upon the grain and other crops swathed or threshed by said threshing or swathing machine or cut and threshed by said combine harvester and thresher for and on account of the services rendered and the labor performed by them on said grain and crops and which lien may be claimed by the owner of said grain for the reasonable value of such services if same are performed by him. Liens on grain and other crops shall be charged for at the prevailing price for that particular locality in which such grain or other crop is threshed, harvested, or combined, provided notices are given and lien is filed within the time provided by this part.

(2) If the prevailing price for threshing, harvesting, or combining grain or other crop is disputed by the thresherman or swather and the owner of the grain or other crop, the matter may be submitted to arbitration under the provisions of chapter 5, Title 27.

**History: En. Sec. 1, Ch. 25, L. 1915; re-en. Sec. 8366, R.C.M. 1921; amd. Sec. 1, Ch. 20, L. 1929; amd. Sec. 1, Ch. 112, L. 1931; amd. Sec. 1, Ch. 124, L. 1933; re-en. Sec. 8366, R.C.M. 1935; amd. Sec. 1, Ch. 308, L. 1973; R.C.M. 1947, 45-801.**

**71-3-802. How lien obtained.** (1) Every person intending to avail himself of the benefits of this part must file with the county clerk of the county in which said grain or other crops were grown, within 10 days after the last service was rendered or labor performed in the threshing of said grain or other crops or the cutting and harvesting and threshing by said combined harvester and thresher, a notice that within 20 days a lien, as specified in 71-3-801, will be claimed and within 20 days thereafter shall file with the county clerk and recorder of the county in which said grain or other crops were grown a just and true account of the amount due him or them for such services or labor after allowing all just credits and offsets and containing a correct description of the grain or other crops to be charged with such lien, the price agreed upon for such threshing or cutting and harvesting, the name of the person, firm, or corporation for whom such labor and services were performed, and a description of the lands as nearly as possible upon which said grain or other crops were raised, and a description of the legal subdivision of land upon which said grain is stored and, if said grain is stored in an elevator, the locality of the elevator, which statements of facts shall be verified by affidavit of the person claiming such lien or his duly authorized agent or attorney having knowledge of the facts. Any error or mistake in the account or description of the grain or other crops or of the property upon which it was raised shall not invalidate such lien.

(2) If the grain or other crops so cut, harvested, and threshed are being hauled from the machine or combine direct to the elevator or to any other purchaser, then the threshermen or owner of the combine desiring to claim such lien shall also serve written notices upon the elevatorman or other private purchaser that he will claim and file a lien upon said grain or other crops for his services or labor performed in threshing or combining and threshing the same.

**History: En. Sec. 2, Ch. 25, L. 1915; amd. Sec. 1, Ch. 162, L. 1917; amd. Sec. 1, Ch. 71, L. 1921; re-en. Sec. 8367, R.C.M. 1921; amd. Sec. 2, Ch. 20, L. 1929; amd. Sec. 2, Ch. 112, L. 1931; re-en. Sec. 8367, R.C.M. 1935; amd. Sec. 2, Ch. 308, L. 1973; R.C.M. 1947, 45-802.**

**71-3-803. Filing with county clerk.** The county clerk must endorse upon such lien the day of its filing, make an abstract thereof in a book kept by him for that purpose and properly indexed, containing the date of the filing, the name of the person claiming the lien, the amount thereof, the name of the person against whose property the lien is filed, and a description of the property to be charged with the same.

**History: En. Sec. 3, Ch. 25, L. 1915; re-en. Sec. 8368, R.C.M. 1921; re-en. Sec. 8368, R.C.M. 1935; R.C.M. 1947, 45-803.**

**71-3-804. Priority.** The lien for work or labor done or services rendered as specified in 71-3-801 shall be prior to and have precedence over any mortgage, encumbrance, or other lien upon said grain or other crops, except the lien for the seed furnished for the purpose of growing this particular crop.

**History: En. Sec. 4, Ch. 25, L. 1915; re-en. Sec. 8369, R.C.M. 1921; re-en. Sec. 8369, R.C.M. 1935; R.C.M. 1947, 45-804.**

**71-3-805. Who considered owners.** Every person, including guardians or minors, married persons, and any company, firm, association, or corporation for whose use or benefit the grain or other crops mentioned herein are threshed or the services rendered or labor performed is deemed the owner thereof for the purposes herein mentioned.

**History: En. Sec. 8, Ch. 25, L. 1915; re-en. Sec. 8373, R.C.M. 1921; re-en. Sec. 8373, R.C.M. 1935; amd. Sec. 26, Ch. 535, L. 1975; R.C.M. 1947, 45-808.**

**71-3-806. Parties.** All persons interested in the matter in controversy or the property to be charged with the lien or having liens thereon may be made parties to an action for the foreclosure thereof.

**History: En. Sec. 7, Ch. 25, L. 1915; re-en. Sec. 8372, R.C.M. 1921; re-en. Sec. 8372, R.C.M. 1935; R.C.M. 1947, 45-807.**

**71-3-807. Limitations of actions.** All actions for the foreclosure and enforcement of the lien herein provided for must be commenced within 6 months from the filing of the lien.

**History: En. Sec. 5, Ch. 25, L. 1915; re-en. Sec. 8370, R.C.M. 1921; amd. Sec. 1, Ch. 28, L. 1923; re-en. Sec. 8370, R.C.M. 1935; R.C.M. 1947, 45-805.**

**71-3-808. Acknowledgment of satisfaction of lien — penalty.** Whenever the indebtedness which is a lien upon any such grain or other crops is paid and satisfied, it is the duty of the lienor to acknowledge satisfaction thereof and to discharge the lien of record; and if any lienor fails to acknowledge satisfaction and discharge said lien as aforesaid within 30 days after being requested to do so by a person having a property interest in such grain or other crops, he is liable to any person injured thereby in the amount of such injury and the costs of action.

**History: En. Sec. 9, Ch. 25, L. 1915; re-en. Sec. 8374, R.C.M. 1921; re-en. Sec. 8374, R.C.M. 1935; amd. Sec. 11-125, Ch. 264, L. 1963; R.C.M. 1947, 45-809.**

**71-3-809. Rules of practice.** Except as otherwise provided, the provisions of Title 25 are applicable to and constitute the rules of practice for the enforcement and foreclosure of the lien herein provided for.

**History: En. Sec. 6, Ch. 25, L. 1915; re-en. Sec. 8371, R.C.M. 1921; re-en. Sec. 8371, R.C.M. 1935; R.C.M. 1947, 45-806.**

**71-3-810. Destruction of records — when allowed.** (1) All threshers' liens which have heretofore or shall hereafter be filed for record in the office of any county clerk and recorder of the several counties in the state shall be retained by such county clerk in a file kept by him for such purposes for a period of 8 years from the time when said threshers' lien has ceased to be a lien on the property described therein.

(2) Upon the expiration of the period of time specified in subsection (1), the county clerk and recorder may destroy all threshers' liens which have been preserved for the period of time specified in this section.

**History: (1)En. Sec. 1, Ch. 113, L. 1935; re-en. Sec. 4813.3, R.C.M. 1935; amd. Sec. 11-112, Ch. 264, L. 1963; Sec. 16-2922, R.C.M. 1947; (2)En. Sec. 2, Ch. 113, L. 1935; re-en. Sec. 4813.4, R.C.M. 1935; amd. Sec. 11-113, Ch. 264, L. 1963; Sec. 16-2923, R.C.M. 1947; R.C.M. 1947, 16-2922(part), 16-2923(part).**

## Part 9

## Crop or Grain Liens for Spraying or Dusting

**71-3-901. Who may have lien — amount.** Any person, firm, corporation, or partnership which shall under contract, express or implied, perform labor or services or furnish material in crop dusting or spraying grains or crops for the purpose of weed, disease, or insect control for promoting the growth of such grains or crops shall have a lien upon all such grains or crops so crop dusted or sprayed for and on account of the labor or service performed and material furnished, upon complying with the provisions of this part; provided, however, that any such lien shall not exceed $1.50 per acre for spraying or dusting wheat, and in the case of other grain or crops, such lien shall not exceed the prevailing price charged in the particular locality in which such grain or crops is sprayed or dusted.

**History: En. Sec. 1, Ch. 205, L. 1953; R.C.M. 1947, 45-1401.**

**71-3-902. How lien obtained.** Any person, firm, corporation, or partnership who is entitled to a lien under this part shall, within 60 days after the last labor or service was performed or material furnished in crop dusting or spraying grains or crops, file in the office of the county clerk and recorder of the county in which said grains or crops were grown a just and true account of the amount due for such services, labor, or material after allowing all proper credits and offsets and containing a description of the grain or crops to be charged with such lien, the price agreed upon for such labor or service or material or, if no price was agreed upon, the reasonable value of the same, together with the name of the person, firm, or corporation for whom such labor or services were performed or material furnished and a description of the lands as nearly as possible upon which said grains or crops were raised, which statements of fact shall be verified by affidavit of the person, firm, corporation, or partnership claiming such lien or his, their, or its duly authorized agent or attorney having knowledge of the facts.

**History: En. Sec. 2, Ch. 205, L. 1953; amd. Sec. 1, Ch. 65, L. 1955; R.C.M. 1947, 45-1402.**

**71-3-903. Filing with county clerk.** The county clerk must endorse upon such lien the day of its filing, make an abstract thereof in a book kept by him for that purpose and properly indexed, containing the date of the filing, the name of the person, firm, corporation, or partnership claiming the lien, the amount thereof, the name of the person against whose property the lien is filed, and a description of the property to be charged with the same.

**History: En. Sec. 3, Ch. 205, L. 1953; R.C.M. 1947, 45-1403.**

**71-3-904. Priority.** The lien for labor or services performed or material furnished as specified in this part shall be prior to and have precedence over any mortgage, encumbrance, or other lien upon said grain or crops, except the lien for seed, hail insurance, threshing, labor, and warehouse services furnished for the purpose of growing or handling the particular grain or crops.

**History: En. Sec. 4, Ch. 205, L. 1953; R.C.M. 1947, 45-1404.**

**71-3-905. Who considered owners.** Every person, including guardians or minors, and any company, firm, association, or corporation for whose use or benefit the grain or other crops mentioned herein are dusted or sprayed or the services or labor performed or material furnished is deemed the owner thereof for the purposes herein mentioned.

**History: En. Sec. 9, Ch. 205, L. 1953; R.C.M. 1947, 45-1409.**

**71-3-906. Parties.** All persons interested in the matter in controversy or the property to be charged with the lien or having liens thereon shall be made parties to an action for the foreclosure thereof.

**History: En. Sec. 8, Ch. 205, L. 1953; R.C.M. 1947, 45-1408.**

**71-3-907. Limitations of actions.** All actions for the foreclosure and enforcement of the lien herein provided for must be commenced within 1 year from the day of the filing of the lien.

**History: En. Sec. 5, Ch. 205, L. 1953; R.C.M. 1947, 45-1405.**

**71-3-908. Acknowledgment of satisfaction and discharge of lien — penalty.** Whenever the indebtedness which is a lien upon any grain or crops is paid and satisfied, it is the duty of the lienor to acknowledge satisfaction thereof and to discharge the lien of record. If any lienor fails to acknowledge satisfaction and discharge said lien within 30 days after being requested to do so by a person having a property interest in such grain or crops, he is liable to any person injured thereby in the amount of such injury and the costs of action.

**History: En. Sec. 10, Ch. 205, L. 1953; amd. Sec. 11-129, Ch. 264, L. 1963; R.C.M. 1947, 45-1410.**

**71-3-909. Rules of practice.** (1) Except as otherwise provided, the provisions of Title 25 are applicable to and constitute the rules of practice for the enforcement and foreclosure of the lien herein provided for.

(2) The provisions of Title 25 relative to new trials and appeals, except insofar as they are inconsistent with the provisions of this part, apply to the proceedings mentioned in this part.

**History: (1)En. Sec. 6, Ch. 205, L. 1953; Sec. 45-1406, R.C.M. 1947; (2)En. Sec. 7, Ch. 205, L. 1953; Sec. 45-1407, R.C.M. 1947; R.C.M. 1947, 45-1406, 45-1407.**

## Part 10

## Laborers' and Materialmen's Liens on Oil and Gas Wells and Pipelines

**71-3-1001. Definitions.** As used in this part, the following definitions apply:

(1) "Furnish" means sell or rent.

(2) "Material" means material, fuel, machinery, equipment, appliances, buildings, structures, tools, bits, or supplies but does not include drilling rigs or hoists or their integral component parts except wire lines.

(3) "Owner" includes a person holding any interest in the legal or equitable title, or both, and purchasers under executory contract.

**History: (1), (2)En. 45-1012 by Sec. 12, Ch. 143, L. 1957; Sec. 45-1012, R.C.M. 1947; (3)En. 45-1011 by Sec. 11, Ch. 143, L. 1957; Sec. 45-1011, R.C.M. 1947; R.C.M. 1947, 45-1011(part), 45-1012.**

**71-3-1002. Lien for labor and materials furnished for use on leasehold for oil and gas purposes or pipelines.** (1) Any person, corporation, or partnership which shall under contract, expressed or implied, with the owner of any leasehold for oil and gas purposes or the owner of any gas pipe or oil pipeline or with the trustee or agent of such owner, perform labor or furnish material or services used in the digging, drilling, torpedoing, completing, operating, or repairing of any oil or gas well or oil or gas pipeline or who shall furnish any material or services or perform any labor in constructing or putting together any of the machinery used in digging, drilling, torpedoing, operating, completing, or repairing any oil or gas well or oil or gas pipeline, whether or not such material is incorporated therein or becomes a part thereof, shall have a lien for the amount due therefor, including transportation and mileage charges connected therewith and interest from the date the same was due, upon the whole of such leasehold or oil or gas pipeline, the appurtenances thereon, and upon all material owned by the owner of such leasehold or oil or gas pipeline and used in the digging, drilling, torpedoing, completing, operating, or repairing of any such oil or gas well or oil or gas pipeline and upon all oil or gas wells located on such leasehold and upon all oil or gas produced from such leasehold and the proceeds thereof inuring to the working interest therein as such working interest existed on the date the labor was first performed or materials or services were first furnished.

(2) However, in the event labor is performed for, or materials or services are furnished to, the owner of the working interest in only a portion of the acreage covered by a lease, the lien granted herein shall be restricted to such portion of the acreage.

(3) The lien herein granted shall not extend to any royalty interests, overriding royalty interests, or oil payments created prior to the date the first item of material or services are furnished or the date the first labor is performed.

**History: En. Sec. 1, Ch. 45, L. 1917; re-en. Sec. 8375, R.C.M. 1921; amd. Sec. 1, Ch. 152, L. 1923; re-en. Sec. 8375, R.C.M. 1935; amd. Sec. 1, Ch. 143, L. 1957; R.C.M. 1947, 45-1001.**

**71-3-1003. Lien for labor or supplies furnished for contractor.** Any person, partnership, or corporation which shall furnish such materials or services as a subcontractor or to a contractor or a subcontractor or any person who shall perform such labor under a subcontractor with a contractor or who, as an artisan or day laborer in the employ of such contractor or subcontractor, shall perform any such labor shall have a lien upon all the property upon which the lien of an original contractor may attach to the same extent as an original contractor, and the lien provided for in this section shall further extend and attach to all materials and fixtures owned by such original contractor or subcontractor to or for whom the labor is performed or material or services furnished and used or employed or furnished to be used or employed in the drilling or operating of such oil and gas wells or in the construction of such pipeline.

**History: En. Sec. 2, Ch. 45, L. 1917; re-en. Sec. 8376, R.C.M. 1921; re-en. Sec. 8376, R.C.M. 1935; amd. Sec. 2, Ch. 143, L. 1957; R.C.M. 1947, 45-1002.**

**71-3-1004. How lien perfected.** Every person, corporation, or partnership claiming a lien under this part shall file with the county clerk of the county in which such land, leasehold, or pipeline or some part thereof is situated a statement verified by affidavit setting forth the amount claimed and the items thereof, the dates on which labor was performed or material or services furnished, the name of the owner of the leasehold or pipeline, if known, the name of the claimant and his mailing address, a description of the leasehold or pipeline, and if the claimant be a claimant under 71-3-1003, the name of the person for whom the labor was immediately performed or the material or services were immediately furnished. Such statement must be filed within 6 months after the date upon which said material or services were last furnished or labor last performed under contract.

**History: En. 45-1004.1 by Sec. 2, Ch. 170, L. 1973; R.C.M. 1947, 45-1004.1.**

**71-3-1005. Enforcement of liens — duty of county clerks.** The liens herein created shall be enforced in the same manner and the duty of county clerks with respect to the filing and abstracting of liens shall be the same as now provided by the laws for materialmen's and mechanic's liens.

**History: En. Sec. 3, Ch. 45, L. 1917; re-en. Sec. 8377, R.C.M. 1921; amd. Sec. 2, Ch. 152, L. 1923; re-en. Sec. 8377, R.C.M. 1935; amd. Sec. 3, Ch. 143, L. 1957; amd. Sec. 1, Ch. 193, L. 1963; amd. Sec. 1, Ch. 170, L. 1973; R.C.M. 1947, 45-1003.**

**71-3-1006. Date lien arises.** The lien provided for in this part arises on the date of the furnishing of the first item of material or services or the date of performance of the first labor.

**History: En. 45-1004.2 by Sec. 3, Ch. 170, L. 1973; R.C.M. 1947, 45-1004.2(part).**

**71-3-1007. Priority.** (1) Upon compliance with the provisions of 71-3-1004, such lien shall be preferred to all other titles, charges, liens, or encumbrances which may attach to or upon any of the property upon which a lien is given by this part subsequent to the date the lien herein provided for arises.

(2) All liens affixed by virtue of this part upon the same property shall be of equal standing.

(3) The lien herein provided for shall have no priority over other liens, encumbrances, or mortgages which are filed or recorded prior to the date of the furnishing of the first item of material or services or the date of performance of the first labor.

**History: (1), (2)En. 45-1004.2 by Sec. 3, Ch. 170, L. 1973; Sec. 45-1004.2, R.C.M. 1947; (3)En. 45-1004.3 by Sec. 4, Ch. 170, L. 1973; Sec. 45-1004.3, R.C.M. 1947; R.C.M. 1947, 45-1004.2(part), 45-1004.3.**

**71-3-1008. Lien for running account as single contract.** All labor performed or materials or services furnished by any person entitled to a lien under this part upon the same leasehold for oil and gas purposes or the same pipeline shall for the purposes of this part be considered as having been performed or furnished under a single contract regardless of whether or not the same was performed or furnished at different times or on separate orders, provided that no more than 6 months shall have elapsed between the date of performance of such labor or the date of furnishing such material or services and the date on which labor is next performed or materials or services are next furnished.

**History: En. 45-1007 by Sec. 7, Ch. 143, L. 1957; R.C.M. 1947, 45-1007.**

**71-3-1009. Liability fixed.** Nothing in this part shall be construed to fix a greater liability against the owner of the land or leasehold interest therein than the price or sum stipulated by such owner to be paid for such materials or services furnished or labor performed. However, the risk of all payments made to the original contractor shall be upon such owner if such payments be made after written notice from a person other than an original contractor is received by such owner at his residence or principal place of business, which notice shall set forth the name and address of the claimant and the amount and nature of his claim. Payment by the owner to the original contractor of all or any part of the contract price, prior to the receipt of such notice, shall operate to discharge and satisfy all liens attaching to the property of such owner by virtue of this part to the extent of such payment. The owner shall not have the right to offset obligations of the original contractor unless such obligations arise out of the original contract.

**History: En. 45-1008 by Sec. 8, Ch. 143, L. 1957; R.C.M. 1947, 45-1008.**

**71-3-1010. Removal of property covered by lien prohibited — effect of wrongful removal.** (1) When any lien provided for by this part shall have attached to the property covered thereby, it shall be unlawful for any person to remove such property or any part thereof or cause the same to be removed from the land or premises where located at the time such lien attached or otherwise dispose of the same without the written consent of the holder of such lien.

(2) In the event such property or some part thereof is about to be removed or disposed of in violation of this section, the district court for the county where such property or any part thereof is located may, upon the verified application of the holder of such lien, enjoin all persons alleged in such application to be about to remove or dispose of such property or some part thereof from removing or disposing of the same.

(3) In the event such property or any part thereof shall have been removed or disposed of in violation of this section, the holder of such lien shall be entitled in any action to foreclose the same to the appointment of a receiver to take possession of such removed or disposed of property wherever the same may be located within this state.

(4) This section shall not preclude the appointment of a receiver in actions brought to foreclose liens given by this part upon any equitable grounds warranting such appointment.

**History: En. 45-1009 by Sec. 9, Ch. 143, L. 1957; R.C.M. 1947, 45-1009.**

**71-3-1011. Notice to purchaser of oil and gas.** Anything in this part to the contrary notwithstanding, any lien claimed by virtue of this part insofar as it may extend to oil or gas or the proceeds of the sale of oil or gas shall not be effective against any purchaser of such oil or gas until written notice of such claim has been delivered to such purchaser at his residence or principal place of business. Such notice shall state the name of the claimant, his address, the amount for which the lien is claimed, and a description of the interest upon which the lien is claimed. Such notice shall be delivered personally to the purchaser or by registered or certified letter deposited in the United States mail. Until such notice is delivered as above provided, no such purchaser shall be liable to the claimant for any oil or gas produced from the interest upon which the lien is claimed or the proceeds thereof, except to the extent of such part of the purchase price of such oil or gas or the proceeds thereof as may be owing by such purchaser at the time of delivery of such written notice. Such purchaser shall withhold payments for such oil or gas runs to the extent of the lien amount claimed until delivery of notice in writing that the claim has been paid.

**History: En. 45-1010 by Sec. 10, Ch. 143, L. 1957; R.C.M. 1947, 45-1010.**

**71-3-1012. Effect on interest which is less than fee interest.** If a lien provided for in this part attaches to an estate less than the fee, forfeiture of such estate shall not impair any lien as to material, appurtenances, and fixtures located thereon and to which said lien has attached prior to forfeiture. If a lien provided for in this part attaches to an equitable interest or to a legal interest contingent upon the happening of a condition subsequent, failure of such interest to ripen into legal title or such condition subsequent to be fulfilled shall not impair any lien as to material, appurtenances, and fixtures located thereon and to which said lien attached prior to such failure.

**History: En. 45-1011 by Sec. 11, Ch. 143, L. 1957; R.C.M. 1947, 45-1011(part).**

## Part 11

## Liens of Physicians, Nurses, and Hospitals in Personal Injury Claims

**71-3-1101. Nature of lien — who may have.** (1) Whenever a physician, nurse, or hospital shall render services in the treatment or care of any person injured through the fault or neglect of another, such physician, nurse, or hospital shall have a lien for the value of such services upon the claim and cause of action for such injury or death resulting therefrom and upon any judgment recovered on account thereof and upon all moneys paid in satisfaction of such judgment or in settlement of such claim or cause of action, upon giving notice and complying with the requirements of this part. No lien under this section shall exceed the provisions of the schedule of fees as adopted by the Montana state medical association.

(2) Such lien, however, shall be subject to any attorney's lien provided for in 37-61-420.

**History: En. Sec. 1, Ch. 57, L. 1931; re-en. Sec. 8395.1, R.C.M. 1935; R.C.M. 1947, 45-1201.**

**71-3-1102. Notice of claim of lien — service.** Any physician, nurse, or hospital claiming such lien shall serve a written notice upon the person or corporation against whom liability for such injury or death is asserted, stating therein the nature of the services and for whom and when rendered and the value thereof and that a lien therefor is claimed as provided by this part.

**History: En. Sec. 2, Ch. 57, L. 1931; re-en. Sec. 8395.2, R.C.M. 1935; R.C.M. 1947, 45-1202.**

**71-3-1103. Filing with clerk of court.** If an action is commenced to recover for such injury or death, a duplicate of such notice and claim of lien shall be filed in the office of the clerk of the court in which such action is pending, and such filing shall be notice to all parties to said action of such lien.

**History: En. Sec. 3, Ch. 57, L. 1931; re-en. Sec. 8395.3, R.C.M. 1935; R.C.M. 1947, 45-1203.**

**71-3-1104. Failure to recognize claim — liability for.** If any person or corporation against whom a claim is made for damages for personal injury or death, after receiving notice of lien as herein provided, shall make payment to the claimant or claimants on account of such injury or death and the amount claimed by any physician, nurse, or hospital for services as stated in the notice so given has not been paid, such person or corporation shall be liable to such physician, nurse, or hospital for the reasonable value of such services.

**History: En. Sec. 4, Ch. 57, L. 1931; re-en. Sec. 8395.4, R.C.M. 1935; R.C.M. 1947, 45-1204.**

**71-3-1105. Exemption for events covered by workers' compensation law.** This part shall not apply to any injury or death for which compensation is awarded under or pursuant to the workers' compensation law of Montana.

**History: En. Sec. 5, Ch. 57, L. 1931; re-en. Sec. 8395.5, R.C.M. 1935; R.C.M. 1947, 45-1205.**

## Part 12

## Agisters' Liens and Liens for Service

**71-3-1201. Who may have lien.** (1) A ranchman, farmer, agister, herder, hotelkeeper, livery, boarding, or feed stablekeeper to whom any horses, mules, cattle, sheep, hogs, or other stock are entrusted, and there is a contract, express or implied, for their keeping, feeding, herding, pasturing, or ranching, has a lien upon such stock for the amount due for keeping, feeding, herding, pasturing, or ranching the same and is authorized to retain possession thereof until the sum due is paid.

(2) Every person who, while lawfully in possession of an article of personal property, renders any service to the owner or lawful claimant thereof by labor or skill employed for the making, repairing, protection, improvement, safekeeping, or carriage thereof has a special lien thereon, dependent on possession, for the compensation, if any, which is due to him from the owner or lawful claimant for such service and for material, if any, furnished in connection therewith.

**History: En. Sec. 3935, Civ. C. 1895; re-en. Sec. 5805, Rev. C. 1907; amd. Sec. 1, Ch. 117, L. 1921; re-en. Sec. 8383, R.C.M. 1921; Cal. Civ. C. Sec. 3051; Based on Field Civ. C. Sec. 1696; re-en. Sec. 8383, R.C.M. 1935; amd. Sec. 11-127, Ch. 264, L. 1963; R.C.M. 1947, 45-1106(part).**

**71-3-1202. Priority.** (1) The lien hereby created shall not take precedence over perfected security interests under the Uniform Commercial Code—Secured Transactions or other recorded liens on the property involved unless within 10 days from the time of receiving the property, the person desiring to assert a lien thereon shall give notice in writing to said secured party or other lienholder, stating his intention to assert a lien on said property, under the terms of this part, and stating the nature and approximate amount of the work or feed performed or furnished or intended to be performed or furnished therefor.

(2) Such service may be made either by personal service or by mailing by registered or certified mail a copy of said notice to the secured party or other lienholder

at his last known post-office address. Said service shall be deemed complete upon the deposit of the notice in the post office.

(3) Within 10 days after the date of such mailing or 5 days after such personal service, the secured party or other lienholder or his representative shall have the right to take possession of said property upon payment of the amount of the lien then accrued. A failure on the part of such secured party or other lienholder so to do shall constitute a waiver of the priority of such security interest or other lien over the lien created by this part.

**History: (1), (2)En. Sec. 3935, Civ. C. 1895; re-en. Sec. 5805, Rev. C. 1907; amd. Sec. 1, Ch. 117, L. 1921; re-en. Sec. 8383, R.C.M. 1921; Cal. Civ. C. Sec. 3051; Based on Field Civ. C. Sec. 1696; re-en. Sec. 8383, R.C.M. 1935; amd. Sec. 11-127, Ch. 264, L. 1963; Sec. 45-1106, R.C.M. 1947; (3)En. Sec. 2, Ch. 117, L. 1921; re-en. Sec. 8384, R.C.M. 1921; Cal. Civ. C. Sec. 3052; re-en. Sec. 8384, R.C.M. 1935; amd. Sec. 11-128, Ch. 264, L. 1963; Sec. 45-1107, R.C.M. 1947; R.C.M. 1947, 45-1106(part), 45-1107.**

**71-3-1203. Enforcement of lien — sale.** If payment for such work, labor, feed, or services or material furnished is not made within 30 days after the performance or furnishing of the same, the person entitled to a lien under the provisions of this section may enforce said lien in the following manner:

(1) He shall deliver to the sheriff or a constable of the county in which the property is located a statement of the amount of his claim against said property, a description of the property, and the name of the owner thereof or of the person at whose request the work, labor, or services were performed or the materials furnished.

(2) Upon receipt of such statement, the sheriff or constable shall proceed to advertise and sell at public auction so much of the property covered by said lien as will satisfy same.

(3) Such sale shall be advertised, conducted, and held in the same manner as provided by law for the sale of mortgaged personal property by sheriffs. Such notice shall be given for not less than 5 or more than 10 days prior to the date of sale.

(4) The proceeds of the sale shall be applied by the sheriff to the discharge of the lien and the cost of the proceedings in selling the property and enforcing the lien, and the remainder, if any, or such part as is required to discharge the claims, shall be turned over by the sheriff to the holders, in the order of their precedence, of the chattel mortgages or other lien claimants of record against said property, and the balance of the proceeds shall be turned over to the owner of the property.

(5) However, before making seizure of any property under the provisions of this section, the sheriff may require an indemnity bond from the lienor in not to exceed double the amount of the claim against said property, said bond and the surety or sureties thereon to be approved by said sheriff.

**History: En. Sec. 3, Ch. 117, L. 1921; re-en. Sec. 8385, R.C.M. 1921; amd. Sec. 1, Ch. 130, L. 1927; re-en. Sec. 8385, R.C.M. 1935; R.C.M. 1947, 45-1108.**

**71-3-1204. Lien not lost by fraudulent taking of property.** The lien created by this part shall not be lost by reason of any forcible or fraudulent taking of the property from the possession of the person entitled to said lien, but in all such cases the person entitled to such lien shall be entitled to recover possession of the property by proper action instituted in court against any person in whose possession the property may be found.

**History: En. Sec. 4, Ch. 117, L. 1921; re-en. Sec. 8386, R.C.M. 1921; re-en. Sec. 8386, R.C.M. 1935; R.C.M. 1947, 45-1109.**

## Part 13

## Liens on Real Estate

**71-3-1301. Lien of seller of real property — waiver.** (1) One who sells real property has a vendor's lien thereon, independent of possession, for so much of the price as remains unpaid and unsecured otherwise than by the personal obligation of the buyer.

(2) Where a buyer of real property gives to the seller a written contract for payment of all or part of the price, an absolute transfer of such contract by the seller waives his lien to the extent of the sum payable under the contract; but a transfer of such contract in trust to pay debts and return the surplus is not a waiver of the lien.

**History: (1)En. Sec. 3930, Civ. C. 1895; re-en. Sec. 5800, Rev. C. 1907; re-en. Sec. 8378, R.C.M. 1921; Cal. Civ. C. Sec. 3046; Field Civ. C. Sec. 1691; re-en. Sec. 8378, R.C.M. 1935; Sec. 45-1101, R.C.M. 1947; (2)En. Sec. 3931, Civ. C. 1895; re-en. Sec. 5801, Rev. C. 1907; re-en. Sec. 8379, R.C.M. 1921; Cal. Civ. C. Sec. 3047; Based on Field Civ. C. Sec. 1692; re-en. Sec. 8379, R.C.M. 1935; Sec. 45-1102, R.C.M. 1947; R.C.M. 1947, 45-1101, 45-1102.**

**71-3-1302. Purchaser's lien on real property.** One who pays to the owner any part of the price of real property, under an agreement for the sale thereof, has a special lien upon the property, independent of possession, for such part of the amount paid as he may be entitled to recover back, in case of a failure of consideration.

**History: En. Sec. 3934, Civ. C. 1895; re-en. Sec. 5804, Rev. C. 1907; re-en. Sec. 8382, R.C.M. 1921; Cal. Civ. C. Sec. 3050; Field Civ. C. Sec. 1695; re-en. Sec. 8382, R.C.M. 1935; R.C.M. 1947, 45-1105.**

**71-3-1303. Extent of liens.** The liens defined in 71-3-1301 and 71-3-1302 are valid against everyone claiming under the debtor, except a purchaser and encumbrancer in good faith and for value.

**History: En. Sec. 3932, Civ. C. 1895; re-en. Sec. 5802, Rev. C. 1907; re-en. Sec. 8380, R.C.M. 1921; Cal. Civ. C. Sec. 3048; Field Civ. C. Sec. 1693; re-en. Sec. 8380, R.C.M. 1935; R.C.M. 1947, 45-1103.**

## Part 14

## Hotel Liens

**71-3-1401. Lien of hotelkeepers.** Hotelmen and boardinghouse and lodginghouse keepers shall have a lien upon the baggage and other property of value brought into such hotel, inn, boardinghouse, or lodginghouse by such guest or boarder or lodger for his accommodation, board, or lodging and room rent and such extras as are furnished at his request, with the right of the possession of such baggage or other property of value until all such charges are paid. Nothing herein contained shall be construed to give a lien upon property sold on the installment plan, title to which is to remain in the vendor until final payment.

**History: En. Sec. 2502, Civ. C. 1895; amd. Sec. 1, p. 132, L. 1899; re-en. Sec. 5166, Rev. C. 1907; re-en. Sec. 7675, R.C.M. 1921; Cal. Civ. C. Sec. 1861; re-en. Sec. 7675, R.C.M. 1935; R.C.M. 1947, 34-103.**

**71-3-1402. Enforcement of lien.** Any hotelkeeper or innkeeper who shall have a lien upon any of the goods, baggage, or other chattel property of his guests may, at the expiration of 6 months from the date of the departure of such guest from such hotel or inn, sell and dispose of the same at public auction and to the highest bidder for cash or so much thereof as may be necessary to pay the sum due such hotelkeeper or innkeeper, together with the cost of storage, advertisement, and sale.

**History: En. Sec. 2512, Civ. C. 1895; re-en. Sec. 5175, Rev. C. 1907; re-en. Sec. 7682, R.C.M. 1921; re-en. Sec. 7682, R.C.M. 1935; R.C.M. 1947, 34-110.**

**71-3-1403. Notice of sale.** Before proceeding to the sale of the property of any guest, as provided in 71-3-1402, such hotelkeeper or innkeeper shall cause a notice of such sale, containing a description of the property to be sold and the time and place where such property will be sold, to be published once each week for 2 successive weeks in a newspaper published in the city or town in which such hotel or inn is situated but, if there be none, then in some newspaper published nearest such town or city and in case any balance arising from such sale shall not be claimed by the rightful owner within 30 days from the day of such sale, the same shall be paid into the treasury of the county in which such sale took place. If such balance be not claimed by the owner thereof or his legal representatives within 1 year thereafter, the same shall be paid into the school fund of such county.

**History: En. Sec. 2513, Civ. C. 1895; re-en. Sec. 5176, Rev. C. 1907; re-en. Sec. 7683, R.C.M. 1921; re-en. Sec. 7683, R.C.M. 1935; R.C.M. 1947, 34-111.**

## Part 15

## Miscellaneous Liens

**71-3-1501. Lien of factor.** A factor has a general lien, dependent on possession, for all that is due to him as such, upon all articles of commercial value that are entrusted to him by the same principal.

**History: En. Sec. 3936, Civ. C. 1895; re-en. Sec. 5806, Rev. C. 1907; re-en. Sec. 8387, R.C.M. 1921; Cal. Civ. C. Sec. 3053; Field Civ. C. Sec. 1697; re-en. Sec. 8387, R.C.M. 1935; R.C.M. 1947, 45-1110.**

**71-3-1502. Banker's lien.** A banker has a general lien, dependent on possession, upon all property in his hands belonging to a customer, for the balance due to him from such customer in the course of the business.

**History: En. Sec. 3937, Civ. C. 1895; re-en. Sec. 5807, Rev. C. 1907; re-en. Sec. 8388, R.C.M. 1921; Cal. Civ. C. Sec. 3054; Field Civ. C. Sec. 1698; re-en. Sec. 8388, R.C.M. 1935; R.C.M. 1947, 45-1111.**

**71-3-1503. Officer's lien.** An officer who levies an attachment or execution upon personal property acquires a special lien, dependent on possession, upon such property, which authorizes him to hold it until the process is discharged or satisfied or a judicial sale of the property is had.

**History: En. Sec. 3940, Civ. C. 1895; re-en. Sec. 5810, Rev. C. 1907; re-en. Sec. 8391, R.C.M. 1921; Cal. Civ. C. Sec. 3057; Field Civ. C. Sec. 1701; re-en. Sec. 8391, R.C.M. 1935; R.C.M. 1947, 45-1114.**

**71-3-1504. Judgment lien.** The lien of a judgment is regulated by Title 25.

**History: En. Sec. 3941, Civ. C. 1895; re-en. Sec. 5811, Rev. C. 1907; re-en. Sec. 8392, R.C.M. 1921; Cal. Civ. C. Sec. 3058; Field Civ. C. Sec. 1703; re-en. Sec. 8392, R.C.M. 1935; R.C.M. 1947, 45-1115.**

**71-3-1505. Lien for rental on frozen food compartments.** A person who operates a frozen food plant which offers individual compartments to the public has a lien on the property in his possession for rentals or other charges due. Liens may be foreclosed in the same way provided for chattel mortgages.

**History: En. Sec. 13, Ch. 17, L. 1967; R.C.M. 1947, 27-623.**

# TITLE 72

## ESTATES, TRUSTS, AND FIDUCIARY RELATIONSHIPS

Ch.
1. Uniform Probate Code — General Provisions.
2. UPC — Intestate Succession and Wills.
3. UPC — Probate and Administration.
4. UPC — Foreign Personal Representatives and Ancillary Administration.
5. UPC — Persons Under Disability — Guardianship and Conservatorship.
Chapters 6 through 9 reserved.
10. Supplementary General Provisions on Probate and Succession.
11. Intestate Succession and Wills — Supplementary Provisions.
12. Probate and Administration — Supplementary Provisions.
13. Persons Under Disability — Supplementary Provisions.
14. Escheated Estates.
15. Public Administrator.
16. Inheritance and Estate Taxes.
17. Anatomical Gift Act.
Chapters 18 and 19 reserved.
20. Trusts in General.
21. Trustees' Powers Act.
22. Conveyance of Trust Property by Court Order.
23. Trusts for Benefit of Third Persons.
24. Trusts in Relation to Real Property.
25. Uniform Principal and Income Act.
26. Uniform Gifts to Minors Act.
27. Miscellaneous Provisions Relating to Trusts.
Chapters 28 and 29 reserved.
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31. Miscellaneous Provisions Relating to Fiduciaries.

## CHAPTER 1

## UNIFORM PROBATE CODE GENERAL PROVISIONS

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Section
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## Part 1

## Short Title, Definitions, Construction, and General Provisions

**72-1-101. Short title.** Chapters 1 through 5 shall be known and may be cited as the "Uniform Probate Code".

**History: En. 91A-1-101 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-1-101.**

**72-1-102. Purposes — liberal construction.** (1) This code shall be liberally construed and applied to promote its underlying purposes and policies.

(2) The underlying purposes and policies of this code are to:

(a) simplify and clarify the law concerning the affairs of decedents, missing persons, protected persons, minors, and incapacitated persons;

(b) discover and make effective the intent of a decedent in distribution of his property;

(c) promote a speedy and efficient system for liquidating the estate of the decedent and making distribution to its successors;

(d) make uniform the law among the various jurisdictions.

**History: En. 91A-1-102 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-1-102.**

**72-1-103. General definitions.** Subject to additional definitions contained in the subsequent chapters which are applicable to specific chapters or parts and unless the context otherwise requires, in this code the following definitions apply:

(1) "Application" means a written request to the clerk for an order of informal probate or appointment under chapter 3, part 2.

(2) "Beneficiary", as it relates to trust beneficiaries, includes a person who has any present or future interest, vested or contingent, and also includes the owner of an interest by assignment or other transfer and, as it relates to a charitable trust, includes any person entitled to enforce the trust.

(3) "Child" includes any individual entitled to take as a child under this code by intestate succession from the parent whose relationship is involved.

(4) "Claims", in respect to estates of decedents and protected persons, includes liabilities of the decedent or protected person, whether arising in contract, in tort,

or otherwise, and liabilities of the estate which arise at or after the death of the decedent or after the appointment of a conservator, including funeral expenses and expenses of administration. The term does not include estate or inheritance taxes, demands or disputes regarding title of a decedent or protected person to specific assets alleged to be included in the estate.

(5) "Clerk" or "clerk of court" means the clerk of the district court.

(6) "Conservator" means a person who is appointed by a court to manage the estate of a protected person.

(7) "Court" means the court having jurisdiction in matters relating to the affairs of decedents. This court in this state is known as district court.

(8) "Devise" when used as a noun means a testamentary disposition of real or personal property and when used as a verb means to dispose of real or personal property by will.

(9) "Devisee" means any person designated in a will to receive a devise. In the case of a devise to an existing trust or trustee or to a trustee on trust described by will, the trust or trustee is the devisee and the beneficiaries are not devisees.

(10) "Disability" means cause for a protective order as described by 72-5-409.

(11) "Distributee" means any person who has received property of a decedent from his personal representative other than as a creditor or purchaser. A testamentary trustee is a distributee only to the extent of distributed assets or increment thereto remaining in his hands. A beneficiary of a testamentary trust to whom the trustee has distributed property received from a personal representative is a distributee of the personal representative. For purposes of this provision, "testamentary trustee" includes a trustee to whom assets are transferred by will, to the extent of the devised assets.

(12) "Estate" includes the property of the decedent, trust, or other person whose affairs are subject to this code as originally constituted and as it exists from time to time during administration.

(13) "Exempt property" means that property of a decedent's estate which is described in 72-2-802.

(14) "Fiduciary" includes personal representative, guardian, conservator, and trustee.

(15) "Foreign personal representative" means a personal representative of another jurisdiction.

(16) "Formal proceedings" means those conducted before a judge with notice to interested persons.

(17) "Guardian" means a person who has qualified as a guardian of a minor or incapacitated person pursuant to testamentary or court appointment but excludes one who is merely a guardian ad litem.

(18) "Heirs" means those persons, including the surviving spouse, who are entitled under the statutes of intestate succession to the property of a decedent.

(19) "Incapacitated person" is as defined in 72-5-101.

(20) "Informal proceedings" means those conducted without notice to interested persons by the clerk of court for probate of a will or appointment of a personal representative.

(21) "Interested person" includes heirs, devisees, children, spouses, creditors, beneficiaries, and any others having a property right in or claim against a trust estate or the estate of a decedent, ward, or protected person which may be affected by the proceeding. It also includes persons having priority for appointment as personal representative and other fiduciaries representing interested persons. The meaning as it relates to particular persons may vary from time to time and must be determined according to the particular purposes of and matter involved in any proceeding.

(22) "Issue" of a person means all his lineal descendants of all generations, with the relationship of parent and child at each generation being determined by the definitions of child and parent contained in this code.

(23) "Lease" includes an oil, gas, coal, or other mineral lease.

(24) "Letters" includes letters testamentary, letters of guardianship, letters of administration, and letters of conservatorship.

(25) "Minor" means a person who is under 18 years of age.

(26) "Mortgage" means any conveyance, agreement, or arrangement in which property is used as security.

(27) "Nonresident decedent" means a decedent who was domiciled in another jurisdiction at the time of his death.

(28) "Organization" includes a corporation, government or governmental subdivision or agency, business trust, estate, trust, partnership or association, two or more persons having a joint or common interest, or any other legal entity.

(29) "Parent" includes any person entitled to take, or who would be entitled to take if the child died without a will, as a parent under this code by intestate succession from the child whose relationship is in question.

(30) "Person" means an individual, a corporation, an organization, or other legal entity.

(31) "Personal representative" includes executor, administrator, successor personal representative, special administrator, and persons who perform substantially the same function under the law governing their status. "General personal representative" excludes special administrator.

(32) "Petition" means a written request to the court for an order after notice.

(33) "Proceeding" includes action at law and suit in equity.

(34) "Property" includes both real and personal property or any interest therein and means anything that may be the subject of ownership.

(35) "Protected person" is as defined in 72-5-101.

(36) "Protective proceeding" is as defined in 72-5-101.

(37) "Securities" includes any note, stock, treasury stock, bond, debenture, evidence of indebtedness, certificate of interest or participation in an oil, gas, or mining title or lease or in payments out of production under such a title or lease, collateral trust certificate, transferable share, voting trust certificate or, in general, any interest or instrument commonly known as a security or any certificate of interest or participation, any temporary or interim certificate, receipt or certificate of deposit for, or any warrant or right to subscribe to or purchase any of the foregoing.

(38) "Settlement", in reference to a decedent's estate, includes the full process of administration, distribution, and closing.

(39) "Special administrator" means a personal representative as described by chapter 3, part 7.

(40) "State" includes any state of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession subject to the legislative authority of the United States.

(41) "Successor personal representative" means a personal representative, other than a special administrator, who is appointed to succeed a previously appointed personal representative.

(42) "Successors" means those persons, other than creditors, who are entitled to property of a decedent under his will or this code.

(43) "Supervised administration" refers to the proceedings described in chapter 3, part 4.

(44) "Testacy proceeding" means a proceeding to establish a will or determine intestacy.

(45) "Trust" includes any express trust, private or charitable, with additions thereto, wherever and however created. It also includes a trust created or determined by judgment or decree under which the trust is to be administered in the manner of an express trust. "Trust" excludes other constructive trusts, and it excludes resulting trusts, conservatorships, personal representatives, custodial

arrangements pursuant to chapter 26 of this title, business trusts providing for certificates to be issued to beneficiaries, common trust funds, voting trusts, security arrangements, liquidation trusts, and trusts for the primary purpose of paying debts, dividends, interest, salaries, wages, profits, pensions, or employee benefits of any kind and any arrangement under which a person is nominee or escrowee for another.

(46) "Trustee" includes an original, additional, or successor trustee, whether or not appointed or confirmed by court.

(47) "Ward" is as defined in 72-5-101.

(48) "Will" includes codicil and any testamentary instrument which merely appoints an executor or revokes or revises another will.

**History: En. 91A-1-201 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-1-201.**

**72-1-104. Supplementary general principles of law applicable.** Unless displaced by the particular provisions of this code, the principles of law and equity supplement its provisions.

**History: En. 91A-1-103 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-1-103.**

**72-1-105. Construction against implied repeal.** This code is a general act intended as a unified coverage of its subject matter, and no part of it shall be deemed impliedly repealed by subsequent legislation if it can reasonably be avoided.

**History: En. 91A-1-105 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-1-105.**

**72-1-106. Uniform Probate Code to take precedence.** Should any provision of this code conflict with any provisions of other statutes of the state of Montana relating to probate, guardianship, or other subjects incorporated in this code and such other statute or statutes was or were adopted prior to the enactment of this code, the provisions of this code shall be deemed to be controlling.

**History: En. 91A-6-104 by Sec. 19, Ch. 365, L. 1974; R.C.M. 1947, 91A-6-104.**

**72-1-107. Effective date — applicability.** (1) This code takes effect on July 1, 1975.

(2) Except as provided elsewhere in this code, on July 1, 1975:

(a) the code applies to any wills of decedents dying thereafter;

(b) the code applies to any proceedings in court then pending or thereafter commenced regardless of the time of the death of decedent, except to the extent that in the opinion of the court the former procedure should be made applicable in a particular case in the interest of justice or because of infeasibility of application of the procedure of this code;

(c) every personal representative, including a person administering an estate of a minor or incompetent holding an appointment on that date, continues to hold the appointment but has only the powers conferred by this code and is subject to the duties imposed with respect to any act occurring or done thereafter;

(d) an act done before July 1, 1975, in any proceeding and any accrued right are not impaired by this code. If a right is acquired, extinguished, or barred upon the expiration of a prescribed period of time which has commenced to run by the provisions of any statute before July 1, 1975, the provisions shall remain in force with respect to that right.

(e) any rule of construction or presumption provided in this code applies to instruments executed and multiple-party accounts opened before July 1, 1975, unless there is a clear indication of a contrary intent.

**History: En. 91A-6-102 by Sec. 3, Ch. 365, L. 1974; R.C.M. 1947, 91A-6-102.**

**72-1-108. Evidential rules applicable — evidence as to death or status.** (1) In proceedings under this code the rules of evidence in courts of general jurisdiction, including any relating to simultaneous deaths, are applicable unless specifically displaced by the code.

(2) In addition, the following rules relating to determination of death and status are applicable:

(a) A certified or authenticated copy of a death certificate purporting to be issued by an official or agency of the place where the death purportedly occurred is prima facie proof of the fact, place, date, and time of death and the identity of the decedent.

(b) A certified or authenticated copy of any record or report of a governmental agency, domestic or foreign, that a person is missing, detained, dead, or alive is prima facie evidence of the status and of the dates, circumstances, and places disclosed by the record or report.

(c) A person who is absent for a continuous period of 7 years, during which he has not been heard from, and whose absence is not satisfactorily explained after diligent search or inquiry is presumed to be dead. His death is presumed to have occurred at the end of the period unless there is sufficient evidence for determining that death occurred earlier.

**History: En. 91A-1-107 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-1-107.**

**72-1-109. Acts by holder of general power.** For the purpose of granting consent or approval with regard to the acts or accounts of a personal representative, including relief from liability or penalty for failure to post bond, or to perform other duties, the sole holder or all coholders of a presently exercisable general power of appointment, including one in the form of a power of amendment or revocation, are deemed to act for beneficiaries to the extent their interests (as objects, takers in default, or otherwise) are subject to the power.

**History: En. 91A-1-108 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-1-108.**

**72-1-110. Instruments not invalidated by code.** (1) Any of the following provisions in an insurance policy, contract of employment, bond, mortgage, promissory note, deposit agreement, pension plan, trust agreement, conveyance, or any other written instrument effective as a contract, gift, conveyance, or trust is deemed to be nontestamentary, and this code does not invalidate the instrument or any provision:

(a) that money or other benefits theretofore due to, controlled or owned by a decedent shall be paid after his death to a person designated by the decedent in either the instrument or a separate writing, including a will, executed at the same time as the instrument or subsequently;

(b) that any money due or to become due under the instrument shall cease to be payable in event of the death of the promisee or the promissor before payment or demand; or

(c) that any property which is the subject of the instrument shall pass to a person designated by the decedent in either the instrument or a separate writing, including a will, executed at the same time as the instrument or subsequently.

(2) Nothing in this section limits the rights of creditors under other laws of this state.

**History: En. 91A-6-101 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-6-101.**

**72-1-111. Remedies for fraud — statute of limitations.** (1) Whenever fraud has been perpetrated in connection with any proceeding or in any statement filed under this code or if fraud is used to avoid or circumvent the provisions or purposes of this code, any person injured thereby may obtain appropriate relief including restitution against the perpetrator of the fraud or any person benefiting from the fraud, whether innocent or not (other than a bona fide purchaser for value and without notice).

(2) Any proceeding must be commenced within 2 years after the discovery of the fraud, but no proceeding may be brought against one not a perpetrator of the fraud later than 5 years after the time of commission of the fraud.

(3) This section has no bearing on remedies relating to fraud practiced on a decedent during his lifetime which affects the succession of his estate.

**History: En. 91A-1-106 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-1-106.**

## Part 2

## Scope, Jurisdiction, and Courts

**72-1-201. Territorial application.** Except as otherwise provided in this code, this code applies to:

(1) the affairs and estates of decedents, missing persons, and persons to be protected in this state;

(2) the property of nonresidents located in this state or property coming into the control of a fiduciary who is subject to the laws of this state; and

(3) incapacitated persons and minors in this state.

**History: En. 91A-1-301 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-1-301.**

**72-1-202. Subject matter jurisdiction.** (1) To the full extent permitted by the constitution, the court has jurisdiction over all subject matter relating to:

(a) estates of decedents, including construction of wills and determination of heirs and successors of decedents, and estates of protected persons; and

(b) protection of minors and incapacitated persons.

(2) The court has full power to make orders, judgments, and decrees and take all other action necessary and proper to administer justice in the matters which come before it.

**History: En. 91A-1-302 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-1-302.**

**72-1-203. Venue — multiple proceedings — transfer.** (1) Where venue for a proceeding under this code may lie in more than one county in the state, the court in which the proceeding is first commenced has the exclusive right to proceed.

(2) If proceedings concerning the same estate, protected person, ward, or trust are commenced in more than one court of this state, the court in which the proceeding was first commenced shall continue to hear the matter, and the other courts shall hold the matter in abeyance until the question of venue is decided, and if the ruling court determines that venue is properly in another court, it shall transfer the proceeding to the other court.

(3) If a court finds that, as a matter of law or in the interest of justice, a proceeding or a file should be located in another court of this state, the court making the finding may transfer the proceeding or file to the other court.

**History: En. 91A-1-303 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-1-303.**

**72-1-204. Records and certified copies.** (1) The clerk of court shall keep a record for each decedent, ward, protected person, or trust involved in any document which may be filed with the court under this code, including petitions and applications, demands for notices or bonds, and of any orders or responses relating thereto by the clerk or court and establish and maintain a system for indexing, filing, or recording which is sufficient to enable users of the records to obtain adequate information.

(2) Upon payment of the fees required by law, the clerk must issue certified copies of any probated wills, letters issued to personal representatives, or any other record or paper filed or recorded.

(3) Certificates relating to probated wills must indicate whether the decedent was domiciled in this state and whether the probate was formal or informal. Certificates relating to letters must show the date of appointment.

**History: En. 91A-1-305 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-1-305.**

**72-1-205. Powers of clerk — performable by clerk or court.** The acts and orders which this code specifies as performable by the clerk of court may be performed either by a judge of the court or by the clerk of court.

**History: En. 91A-1-307 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-1-307.**

**72-1-206. Oath or affirmation on filed documents.** Except as otherwise specifically provided in this code or by rule, every document filed with the court under this code, including applications, petitions, and demands for notice, shall be deemed to include an oath, affirmation, or statement to the effect that its representations are true as far as the person executing or filing it knows or is informed; deliberate falsification therein shall constitute the offense of false swearing.

**History: En. 91A-1-309 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-1-309.**

**72-1-207. Rules of civil procedure to apply.** Unless specifically provided to the contrary in this code or unless inconsistent with its provisions, the rules of civil procedure, including the rules concerning vacation of orders and appellate review, govern formal proceedings under this code.

**History: En. 91A-1-304 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-1-304.**

**72-1-208. Jury trial.** (1) If duly demanded, a party is entitled to trial by jury in a formal testacy proceeding, a formal proceeding for determination of heirship, and any other proceeding as may be provided for by law.

(2) If there is no right to trial by jury under subsection (1) or the right is waived, the court in its discretion may call a jury to decide any issue of fact, in which case the verdict is advisory only.

**History: En. 91A-1-306 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-1-306.**

**72-1-209. Appeals.** Appellate review, including the right to appellate review, interlocutory appeal, provisions as to time, manner, notice, appeal bond, stays, scope of review, record on appeal, briefs, arguments, and power of the appellate court, is governed by the statutes and rules applicable to the appeals to the supreme court.

**History: En. 91A-1-308 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-1-308.**

## Part 3

## Notices, Parties, and Representation Generally

**72-1-301. Notice — method and time of giving.** (1) If notice of a hearing on any petition is required and except for specific notice requirements as otherwise provided, the petitioner shall cause notice of the time and place of hearing of any petition to be given to any interested person or his attorney if he has appeared by attorney or requested that notice be sent to his attorney. Notice shall be given:

(a) by mailing a copy thereof at least 14 days before the time set for the hearing by certified, registered, or ordinary first-class mail addressed to the person being notified at the post-office address given in his demand for notice, if any, or at his office or place of residence, if known;

(b) by delivering a copy thereof to the person being notified personally at least 14 days before the time set for the hearing; or

(c) if the address or identity of any person is not known and cannot be ascertained with reasonable diligence, by publishing in a weekly paper once a week for 3 consecutive weeks and, if in a newspaper published more often than once a week, by publishing on at least 3 different days of publication, and it shall be so published that there must be at least 10 days from the first to the last day of publication, both the first and last day being included.

(2) The court for good cause shown may provide for a different method or time of giving notice for any hearing.

(3) Proof of the giving of notice shall be made on or before the hearing and filed in the proceeding.

**History: En. 91A-1-401 by Sec. 1, Ch. 365, L. 1974; amd. Sec. 1, Ch. 516, L. 1975; R.C.M. 1947, 91A-1-401.**

**72-1-302. Waiver of notice.** A person, including a guardian ad litem, conservator, or other fiduciary, may waive notice by a writing signed by him or his attorney and filed in the proceeding.

**History: En. 91A-1-402 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-1-402.**

**72-1-303. Pleadings — when orders or notice binding one binds another — representation.** In formal proceedings involving trusts or estates of decedents, minors, protected persons, or incapacitated persons and in judicially supervised settlements, the following apply:

(1) Interests to be affected shall be described in pleadings which give reasonable information to owners by name or class, by reference to the instrument creating the interests, or in other appropriate manner.

(2) Persons are bound by orders binding others in the following cases:

(a) Orders binding the sole holder or all coholders of a power of revocation or a presently exercisable general power of appointment, including one in the form of a power of amendment, bind other persons to the extent their interests (as objects, takers in default, or otherwise) are subject to the power.

(b) To the extent there is no conflict of interest between them or among persons represented, orders binding a conservator bind the person whose estate he controls; orders binding a guardian bind the ward if no conservator of his estate has been appointed; orders binding a trustee bind beneficiaries of the trust in proceedings to probate a will establishing or adding to a trust, to review the acts or accounts of a prior fiduciary, and in proceedings involving creditors or other third parties; and orders binding a personal representative bind persons interested in the undistributed assets of a decedent's estate in actions or proceedings by or against the estate. If there is no conflict of interest and no conservator or guardian has been appointed, a parent may represent his minor child.

(c) An unborn or unascertained person who is not otherwise represented is bound by an order to the extent his interest is adequately represented by another party having a substantially identical interest in the proceeding.

(3) Notice is required as follows:

(a) Notice as prescribed by 72-1-301 shall be given to every interested person or to one who can bind an interested person as described in (2)(a) or (2)(b) above. Notice may be given both to a person and to another who may bind him.

(b) Notice is given to unborn or unascertained persons, who are not represented under (2)(a) or (2)(b) above, by giving notice to all known persons whose interests in the proceedings are substantially identical to those of the unborn or unascertained persons.

(4) At any point in a proceeding, a court may appoint a guardian ad litem to represent the interest of a minor, an incapacitated, unborn, or unascertained person, or a person whose identity or address is unknown, if the court determines that representation of the interest otherwise would be inadequate. If not precluded by conflict of interests, a guardian ad litem may be appointed to represent several persons or interests. The court shall set out its reasons for appointing a guardian ad litem as a part of the record of the proceeding.

**History: En. 91A-1-403 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-1-403.**

# CHAPTER 2

# UPC — INTESTATE SUCCESSION AND WILLS

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## Part 1

## General Provisions

**72-2-101. Renunciation of succession.** (1) A person (or his personal representative) who is an heir, devisee, person succeeding to a renounced interest, beneficiary under a testamentary instrument, or person designated to take pursuant to a power of appointment exercised by a testamentary instrument may renounce in whole or in part the succession to any property or interest therein by filing a written instrument within the time and at the place hereinafter provided. The instrument shall:

(a) describe the property or part thereof or interest therein renounced;

(b) be signed by the person renouncing; and

(c) declare the renunciation and the extent thereof.

(2) The writing specified in subsection (1) must be filed within 6 months after the death of the decedent or the donee of the power or, if the taker of the property is not then finally ascertained, not later than 6 months after the event by which the taker or the interest is finally ascertained. The writing must be filed in the court of the county where proceedings concerning the decedent's estate are pending or where they would be pending if commenced. A copy of the writing also shall be mailed to the personal representative of the decedent.

(3) Unless the decedent or donee of the power has otherwise indicated by his will, the interest renounced and any future interest which is to take effect in possession or enjoyment at or after the termination of the interest renounced passes as if the person renouncing had predeceased the decedent or, if the person renouncing is one designated to take pursuant to a power of appointment exercised by a testamentary instrument, as if the person renouncing had predeceased the donee of the power. In every case the renunciation relates back for all purposes to the date of death of the decedent or the donee, as the case may be.

(4) Any assignment, conveyance, encumbrance, pledge, or transfer of property therein or any contract therefor, written waiver of the right to renounce, or any acceptance of property by an heir, devisee, person succeeding to a renounced interest, beneficiary, or person designated to take pursuant to a power of appointment exercised by testamentary instrument or sale or other disposition of property pursuant to judicial process, made before the expiration of the period in which he is permitted to renounce, bars the right to renounce as to the property.

(5) The right to renounce granted by this section exists irrespective of any limitation on the interest of the person renouncing in the nature of a spendthrift provision or similar restriction.

(6) This section does not abridge the right of any person to assign, convey, release, or renounce any property arising under any other section of this code or other statute.

(7) Any interest in property which exists on July 1, 1975, but which has not then become indefeasibly fixed both in quality and quantity or the taker of which has not then become finally ascertained, may be renounced after July 1, 1975, as provided herein. An interest which has arisen prior to July 1, 1975, in any person other than the person renouncing is not destroyed or diminished by any action of the person renouncing taken under this section.

**History: En. 91A-2-801 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-2-801.**

**72-2-102. Waiver of rights by spouse.** The right of election of a surviving spouse and the rights of the surviving spouse to homestead allowance, exempt property, and family allowance or any of them may be waived, wholly or partially, before or after marriage, by a written contract, agreement, or waiver signed by the party waiving after fair disclosure. Unless it provides to the contrary, a waiver of "all rights" (or equivalent language) in the property or estate of a present or prospective spouse or a complete property settlement entered into after or in anticipation of separation or divorce is a waiver of all rights to elective share, homestead allowance, exempt property, and family allowance by each spouse in the property of the other and a renunciation by each of all benefits which would otherwise pass to him from the other by intestate succession or by virtue of the provisions of any will executed before the waiver or property settlement.

**History: En. 91A-2-204 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-2-204.**

**72-2-103. Effect of divorce, annulment, or separation decree.** (1) A person who is divorced from the decedent or whose marriage to the decedent has been annulled is not a surviving spouse unless by virtue of a subsequent marriage he is married to the decedent at the time of death. A decree of separation which does not terminate the status of husband and wife is not a divorce for purposes of this section.

(2) For purposes of chapter 2, parts 2, 6, 7, and 8 and of 72-3-501 through 72-3-508, a surviving spouse does not include:

(a) a person who obtains or consents to a final decree or judgment of divorce from the decedent or an annulment of their marriage, which decree or judgment is not recognized as valid in this state, unless they subsequently participate in a marriage ceremony purporting to marry each to the other or subsequently live together as man and wife;

(b) a person who, following a decree or judgment of divorce or annulment obtained by the decedent, participates in a marriage ceremony with a third person; or

(c) a person who was a party to a valid proceeding concluded by an order purporting to terminate all marital property rights.

**History: En. 91A-2-802 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-2-802.**

**72-2-104. Homicide — effect on intestate succession, wills, joint assets, life insurance, and beneficiary designations.** (1) A surviving spouse, heir, or devisee who feloniously and intentionally kills the decedent is not entitled to any benefits under the will or under this chapter, and the estate of decedent passes as if the killer had predeceased the decedent. Property appointed by the will of the decedent to or for the benefit of the killer passes as if the killer had predeceased the decedent.

(2) Any joint tenant who feloniously and intentionally kills another joint tenant thereby effects a severance of the interest of the decedent so that the share of the decedent passes as his property and the killer has no rights by survivorship. This provision applies to joint tenancies in real and personal property, joint accounts in banks, savings and loan associations, credit unions, and other institutions, and any other form of co-ownership with survivorship incidents.

(3) A named beneficiary of a bond, life insurance policy, or other contractual arrangement who feloniously and intentionally kills the principal obligee or the person upon whose life the policy is issued is not entitled to any benefit under the bond, policy, or other contractual arrangement, and it becomes payable as though the killer had predeceased the decedent.

(4) Any other acquisition of property or interest by the killer shall be treated in accordance with the principles of this section.

(5) A final judgment of conviction of felonious and intentional killing is conclusive for purposes of this section. In the absence of a conviction of felonious and intentional killing, the court may determine by a preponderance of evidence whether the killing was felonious and intentional for purposes of this section.

(6) This section does not affect the rights of any person who, before rights under this section have been adjudicated, purchases from the killer for value and without notice property which the killer would have acquired except for this section, but the killer is liable for the amount of the proceeds or the value of the property. Any insurance company, bank, or other obligor making payment according to the terms of its policy or obligation is not liable by reason of this section

unless prior to payment it has received at its home office or principal address written notice of a claim under this section.

**History: En. 91A-2-803 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-2-803.**

**72-2-105. Contracts concerning succession.** (1) A contract to make a will or devise or not to revoke a will or devise or to die intestate, if executed after July 1, 1975, can be established only by:

(a) provisions of a will stating material provisions of the contract;

(b) an express reference in a will to a contract and extrinsic evidence proving the terms of the contract; or

(c) a writing signed by the decedent evidencing the contract.

(2) The execution of a joint will or mutual wills does not create a presumption of a contract not to revoke the will or wills.

**History: En. 91A-2-701 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-2-701.**

## Part 2

## Intestate Succession

**72-2-201. Intestate estate.** Any part of the estate of a decedent not effectively disposed of by his will passes to his heirs as prescribed in the following sections of this code.

**History: En. 91A-2-101 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-2-101.**

**72-2-202. Share of spouse.** The intestate share of the surviving spouse is:

(1) if there is no surviving issue or if there are surviving issue all of whom are issue of the surviving spouse also, the entire remaining estate;

(2) if there are surviving issue one or more of whom are not issue of the surviving spouse, as follows:

(a) if there is surviving only one such child or the issue of one such child, one-half of the intestate estate;

(b) if there are surviving more than one such child or one such child and the issue of one or more deceased children, one-third of the intestate estate.

**History: En. 91A-2-102 by Sec. 1, Ch. 365, L. 1974; amd. Sec. 1, Ch. 363, L. 1975; R.C.M. 1947, 91A-2-102.**

**72-2-203. Share of heirs other than surviving spouse.** The part of the intestate estate not passing to the surviving spouse under 72-2-202, or the entire intestate estate if there is no surviving spouse, passes as follows:

(1) to the issue of the decedent; if they are all of the same degree of kinship to the decedent, they take equally, but if of unequal degree, then those of more remote degree take by representation;

(2) if there are surviving several children or one child and the issue of one or more children and any such surviving child dies under age and not having been married, all the estate that came to such deceased child by inheritance from the decedent, in equal shares to the other children of the same parent and to the issue of any such other children who are dead, by representation; and if, at the death of such child, who dies under age not having been married, all the other children of his parents are also dead and any of them have left issue, to the issue of all other children of the same parent; and if all the issue are in the same degree of kinship to such child, they take equally, but if of unequal degree, then those of more remote degree take by representation;

(3) if there is no surviving issue, to his parent or parents equally;

(4) if there is no surviving issue or parent, to the brothers and sisters and the children or grandchildren of any deceased brother or sister, by representation;

(5) if there is no surviving issue, parent, brother, sister, or children or grandchildren of a deceased brother or sister, to the next of kin in equal degree, except that where there are two or more collateral kindred in equal degree but claiming through different ancestors, those who claim through the nearer ancestors must be preferred to those claiming through an ancestor more remote.

**History: En. 91A-2-103 by Sec. 1, Ch. 365, L. 1974; amd. Sec. 2, Ch. 363, L. 1975; R.C.M. 1947, 91A-2-103.**

**72-2-204. Representation.** If representation is called for by this code, the estate is divided into as many shares as there are surviving heirs in the nearest degree of kinship and deceased persons in the same degree who left issue who survive the decedent, each surviving heir in the nearest degree receiving one share and the share of each deceased person in the same degree being divided among his issue in the same manner.

**History: En. 91A-2-106 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-2-106.**

**72-2-205. Requirement that heir survive decedent by one hundred twenty hours.** Any person who fails to survive the decedent by 120 hours is deemed to have predeceased the decedent for purposes of homestead allowance, exempt property, and intestate succession, and the decedent's heirs are determined accordingly. If the time of death of the decedent or of the person who would otherwise be an heir or the times of death of both cannot be determined and it cannot be established that the person who would otherwise be an heir has survived the decedent by 120 hours, it is deemed that the person failed to survive for the required period. This section is not to be applied where its application would result in a taking of intestate estate by the state under 72-2-207.

**History: En. 91A-2-104 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-2-104.**

**72-2-206. Advancements.** If a person dies intestate as to all his estate, property which he gave in his lifetime to an heir is treated as an advancement against the latter's share of the estate only if declared in a contemporaneous writing by the decedent or acknowledged in writing by the heir to be an advancement. For this purpose, the property advanced is valued as of the time the heir came into possession or enjoyment of the property or as of the time of death of the decedent, whichever first occurs. If the recipient of the property fails to survive the decedent, the property is not taken into account in computing the intestate share to be received by the recipient's issue unless the declaration or acknowledgment provides otherwise.

**History: En. 91A-2-110 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-2-110.**

**72-2-207. No taker — escheat to state.** If there is no taker under the provisions of 72-2-202 and 72-2-203, the intestate estate passes to the state of Montana.

**History: En. 91A-2-105 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-2-105.**

**72-2-208 through 72-2-210 reserved.**

**72-2-211. Kindred of half blood.** Relatives of the half blood inherit the same share they would inherit if they were of the whole blood.

**History: En. 91A-2-107 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-2-107.**

**72-2-212. Afterborn heirs.** Relatives of the decedent conceived before his death but born thereafter inherit as if they had been born in the lifetime of the decedent.

**History: En. 91A-2-108 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-2-108.**

**72-2-213. Establishment of parent-child relationship.** If, for the purposes of intestate succession, a relationship of parent and child must be established to determine succession by, through, or from a person:

(1) An adopted person shall inherit as the child of an adopting parent.

(2) In cases not covered by (1), a person born out of wedlock is a child of the mother. That person is also a child of the father, if:

(a) the natural parents participated in a marriage ceremony before or after the birth of the child, even though the attempted marriage is void; or

(b) the paternity is established by an adjudication before the death of the father or is established thereafter by clear and convincing proof, except that the paternity established under this subsection (b) is ineffective to qualify the father or his kindred to inherit from or through the child unless the father has openly treated the child as his and has not refused to support the child.

**History: En. 91A-2-109 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-2-109.**

**72-2-214. Alienage.** No person is disqualified to take as an heir because he or a person through whom he claims is an alien unless the country in which he resides does not allow reciprocity.

**History: En. 91A-2-111 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-2-111.**

**72-2-215. Reporting duty of personal representative in estate involving alien heir.** In any estate where money or property does not vest in any alien person because of the provisions of 72-2-214, it shall be the duty of the personal representative or special administrator, within 30 days of having completed and filed the inventory and statement of value, to furnish the attorney general with the following written information and file a copy in the probate proceedings:

(1) the names and addresses of the alien heirs, devisees, legatees, or beneficiaries in the estate;

(2) the share or proportionate share of each of the alien heirs;

(3) the stated value of the entire estate.

**History: En. 91A-2-112 by Sec. 1, Ch. 370, L. 1977; R.C.M. 1947, 91A-2-111.1.**

## Part 3

## Wills — Execution, Addendums, and Revocation

**72-2-301. Who may make a will.** Any person 18 or more years of age who is of sound mind may make a will.

**History: En. 91A-2-501 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-2-501.**

**72-2-302. Execution.** Except as provided for holographic wills, writings within 72-2-312, and wills within 72-2-306, every will shall be in writing signed by the testator or in the testator's name by some other person in the testator's presence and by his direction and shall be signed by at least two persons each of whom witnessed either the signing or the testator's acknowledgment of the signature or of the will.

**History: En. 91A-2-502 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-2-502.**

**72-2-303. Holographic will.** A will which does not comply with 72-2-302 is valid as a holographic will, whether or not witnessed, if the signature and the material provisions are in the handwriting of the testator.

**History: En. 91A-2-503 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-2-503.**

**72-2-304. Self-proved will.** An attested will may, at the time of its execution or at any subsequent date, be made self-proved by the acknowledgment thereof by the testator and the affidavits of the witnesses, each made before an officer authorized to administer oaths under the laws of this state and evidenced by the officer's cerificate, under official seal, attached or annexed to the will in form and content substantially as follows:

THE STATE OF ............................................................................................................

COUNTY OF ................................................................................................................

We, ...., ...., and ...., the testator and the witnesses, respectively, whose names are signed to the attached or foregoing instrument, being first duly sworn, do hereby declare to the undersigned authority that the testator signed and executed the instrument as his last will and that he had signed willingly or directed another to sign for him and that he executed it as his free and voluntary act for the purposes therein expressed and that each of the witnesses, in the presence and hearing of the testator, signed the will as witness and that to the best of his knowledge the testator was at that time 18 or more years of age, of sound mind, and under no constraint or undue influence.

..............................................................Testator
..............................................................Witness
..............................................................Witness

Subscribed, sworn to, and acknowledged before me by ...., the testator, and subscribed and sworn to before me by .... and ...., witnesses, this .... day of ...., ....

(SEAL)

(Signed) ..........................................................
(Official capacity of officer) ...........................

**History: En. 91A-2-504 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-2-504.**

**72-2-305. Who may witness — effect of witness by beneficiary.** (1) Any person generally competent to be a witness may act as a witness to a will.

(2) A will is not invalid because the will is signed by an interested witness.

(3) All beneficial devises made in any will to a subscribing witness thereto are void unless there are two other competent subscribing witnesses to the same, but a mere charge on the estate of the testator does not prevent his creditors from being competent witnesses to his will.

(4) If a witness, to whom any beneficial devise, void under the preceding section, is made, would have been entitled to any share of the estate of the testator if the testator had died intestate, such witness succeeds to so much of the share as would be distributed to him under intestate succession, not exceeding the devise or bequest made to him in the will.

**History: En. 91A-2-505 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-2-505.**

**72-2-306. Choice of law as to execution.** A written will is valid if executed in compliance with 72-2-302 or 72-2-303 or if its execution complies with the law at the time of execution of the place where the will is executed or of the law of the place where at the time of execution or at the time of death the testator is domiciled, has a place of abode, or is a national.

**History: En. 91A-2-506 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-2-506.**

**72-2-307 through 72-2-310 reserved.**

**72-2-311. Incorporation by reference.** Any writing in existence when a will is executed may be incorporated by reference if the language of the will manifests this intent and describes the writing sufficiently to permit its identification.

**History: En. 91A-2-510 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-2-510.**

**72-2-312. Separate writing identifying disposition of tangible personal property.** (1) Whether or not the provisions relating to holographic wills apply, a will may refer to a written statement or list to dispose of items of tangible personal property not otherwise specifically disposed of by the will, other than money, evidences of indebtedness, documents of title, and securities and property used in trade or business.

(2) To be admissible under this section as evidence of the intended disposition, the writing must either be in the handwriting of the testator or be signed by him and must describe the items and the devisees with reasonable certainty.

(3) The writing may be:

(a) referred to as one to be in existence at the time of the testator's death;

(b) prepared before or after the execution of the will;

(c) altered by the testator after its preparation; and

(d) a writing which has no significance apart from its effect upon the dispositions made by the will.

**History: En. 91A-2-513 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-2-513.**

**72-2-313. Events of independent significance.** A will may dispose of property by reference to acts and events which have significance apart from their effect upon the dispositions made by the will, whether they occur before or after the execution of the will or before or after the testator's death. The execution or revocation of a will of another person is such an event.

**History: En. 91A-2-512 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-2-512.**

**72-2-314. Testamentary additions to trusts.** A devise or bequest, the validity of which is determinable by the law of this state, may be made by a will to the trustee of a trust established or to be established by the testator or by the testator and some other person or by some other person (including a funded or unfunded life insurance trust, although the trustor has reserved any or all rights of ownership of the insurance contracts) if the trust is identified in the testator's will and its terms are set forth in a written instrument (other than a will) executed before or concurrently with the execution of the testator's will or in the valid last will of a person who has predeceased the testator (regardless of the existence, size, or character of the corpus of the trust). The devise is not invalid because the trust is amendable or revocable or because the trust was amended after the execution of the will or after the death of the testator. Unless the testator's will provides otherwise, the property so devised is not deemed to be held under a testamentary trust of the testator but becomes a part of the trust to which it is given and shall be administered and disposed of in accordance with the provisions of the instrument or will setting forth the terms of the trust, including any amendments thereto made before the death of the testator (regardless of whether made before or after the execution of the testator's will) and if the testator's will so provides, including any amendments to the trust made after the death of the testator. A revocation or termination of the trust before the death of the testator causes the devise to lapse.

**History: En. 91A-2-511 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-2-511.**

**72-2-315 through 72-2-320 reserved.**

**72-2-321. Revocation by writing or act.** A will or any part thereof is revoked:

(1) by a subsequent will which revokes the prior will or part expressly or by inconsistency; or

(2) by being burned, torn, canceled, obliterated, or destroyed with the intent and for the purpose of revoking it by the testator or by another person in his presence and by his direction.

**History: En. 91A-2-507 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-2-507.**

**72-2-322. Revocation by divorce or annulment — no revocation by other change in circumstances.** (1) If after executing a will the testator is divorced or his marriage annulled, the divorce or annulment revokes any disposition or appointment of property made by the will to the former spouse, any provision conferring a general or special power of appointment on the former spouse, and any nomination of the former spouse as executor, trustee, conservator, or guardian, unless the will expressly provides otherwise.

(2) Property prevented from passing to a former spouse because of revocation by divorce or annulment passes as if the former spouse failed to survive the decedent, and other provisions conferring some power or office on the former spouse are interpreted as if the spouse failed to survive the decedent.

(3) If provisions are revoked solely by this section, they are revived by testator's remarriage to the former spouse.

(4) For purposes of this section, divorce or annulment means any divorce or annulment which would exclude the spouse as a surviving spouse within the meaning of 72-2-103(2). A decree of separation which does not terminate the status of husband and wife is not a divorce for purposes of this section.

(5) No change of circumstances other than as described in this section revokes a will.

**History: En. 91A-2-508 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-2-508.**

**72-2-323. Revival of revoked will.** (1) If a second will which, had it remained effective at death, would have revoked the first will in whole or in part is thereafter revoked by acts under 72-2-321, the first will is revoked in whole or in part unless it is evident from the circumstances of the revocation of the second will or from testator's contemporary or subsequent declarations that he intended the first will to take effect as executed.

(2) If a second will which, had it remained effective at death, would have revoked the first will in whole or in part is thereafter revoked by a third will, the first will is revoked in whole or in part, except to the extent it appears from the terms of the third will that the testator intended the first will to take effect.

**History: En. 91A-2-509 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-2-509.**

## Part 4

## Wills — Custody and Deposit

**72-2-401. Duty of custodian to deliver will — liability.** (1) After the death of a testator and on request of an interested person, any person having custody of a will of the testator shall deliver it with reasonable promptness to a person able to secure its probate and, if none is known, to an appropriate court.

(2) Any person who willfully fails to deliver a will is liable to any person aggrieved for the damages which may be sustained by the failure. Any person who willfully refuses or fails to deliver a will after being ordered by the court in a proceeding brought for the purpose of compelling delivery is subject to penalty for contempt of court.

**History: En. 91A-2-902 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-2-902.**

**72-2-402. Deposit of will with court — confidentiality — examination by conservator — delivery.** (1) A will may be deposited by the testator or his agent with any court for safekeeping, under rules of the court. The will shall be kept confidential.

(2) During the testator's lifetime a deposited will shall be delivered only to him or to a person authorized in writing signed by him to receive the will.

(3) A conservator may be allowed to examine a deposited will of a protected testator under procedures designed to maintain the confidential character of the document to the extent possible and to assure that it will be resealed and left on deposit after the examination.

(4) Upon being informed of the testator's death, the court shall notify any person designated to receive the will and deliver it to him on request, or the court may deliver the will to the appropriate court.

**History: En. 91A-2-901 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-2-901.**

## Part 5

## Wills — Construction and Operation

**72-2-501. Intention of testator controls.** The intention of a testator as expressed in his will controls the legal effect of his dispositions. The rules of construction expressed in the succeeding sections of this part apply unless a contrary intention is indicated by the will.

**History: En. 91A-2-603 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-2-603.**

**72-2-502. Will construed to pass all property — after-acquired property.** A will is construed to pass all property which the testator owns at his death, including property acquired after the execution of the will.

**History: En. 91A-2-604 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-2-604.**

**72-2-503. Half-bloods, adopted persons, and illegitimates included in class gift terminology.** Half-bloods, adopted persons, and persons born out of wedlock are included in class gift terminology and terms of relationship in accordance with rules for determining relationships for purposes of intestate succession.

**History: En. 91A-2-611 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-2-611.**

**72-2-504. Choice of law as to meaning and effect of wills.** The meaning and legal effect of a disposition in a will shall be determined by the local law of a particular state selected by the testator in his instrument unless the application of that law is contrary to the public policy of this state otherwise applicable to the disposition.

**History: En. 91A-2-602 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-2-602.**

**72-2-505 through 72-2-510 reserved.**

**72-2-511. Requirement that devisee survive testator by one hundred twenty hours.** A devisee who does not survive the testator by 120 hours is treated as if he predeceased the testator unless the will of decedent contains some language dealing explicitly with simultaneous deaths or deaths in a common disaster or requiring that the devisee survive the testator or survive the testator for a stated period in order to take under the will.

**History: En. 91A-2-601 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-2-601.**

**72-2-512. Antilapse.** (1) If a devisee who is a grandparent or a lineal descendant of a grandparent of the testator is dead at the time of execution of the will, fails to survive the testator, or is treated as if he predeceased the testator, the issue of the deceased devisee who survive the testator by 120 hours take in place of the deceased devisee and if they are all of the same degree of kinship to the devisee, they take equally, but if of unequal degree then those of more remote degree take by representation.

(2) One who would have been a devisee under a class gift if he had survived the testator is treated as a devisee for purposes of this section whether his death occurred before or after the execution of the will.

**History: En. 91A-2-605 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-2-605.**

**72-2-513. Failure of devise.** (1) Except as provided in 72-2-512, if a devise other than a residuary devise fails for any reason, it becomes a part of the residue.

(2) Except as provided in 72-2-512, if the residue is devised to two or more persons and the share of one of the residuary devisees fails for any reason, his share passes to the other residuary devisee or to other residuary devisees in proportion to their interests in the residue.

**History: En. 91A-2-606 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-2-606.**

**72-2-514. Nonexoneration — specific devise subject to security interest.** A specific devise passes subject to any security interest existing at the date of death, without right of exoneration, regardless of a general directive in the will to pay debts.

**History: En. 91A-2-609 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-2-609.**

**72-2-515. Ademption by satisfaction.** Property which a testator gave in his lifetime to a person is treated as a satisfaction of a devise to that person, in whole or in part, only if the will provides for deduction of the lifetime gift or the testator declares in a contemporaneous writing that the gift is to be deducted from the devise or is in satisfaction of the devise or the devisee acknowledges in writing that the gift is in satisfaction. For purpose of partial satisfaction, property given during lifetime is valued as of the time the devisee came into possession or enjoyment of the property or as of the time of death of the testator, whichever occurs first.

**History: En. 91A-2-612 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-2-612.**

**72-2-516. Nonademption of specific devises in certain cases.** (1) If specifically devised property is sold by a conservator or if a condemnation award or insurance proceeds are paid to a conservator as a result of condemnation, fire, or casualty, the specific devisee has the right to a pecuniary devise equal to so much of the sale price, condemnation award, or insurance proceeds as remains in the estate and is identifiable at the time of the decedent's death. This subsection does not apply if subsequent to the sale, condemnation, or casualty it is adjudicated that the disability of the testator has ceased and the testator survives the adjudication by 1 year. The right of the specific devisee under this subsection is reduced by any right he has under subsection (2).

(2) A specific devisee has the right to the remaining specifically devised property and:

(a) any balance of the purchase price (together with any security interest) owing from a purchaser to the testator at death by reason of sale of the property;

(b) any amount of a condemnation award for the taking of the property unpaid at death;

(c) any proceeds unpaid at death on fire or casualty insurance on the property; and

(d) property owned by testator at his death as a result of foreclosure or obtained in lieu of foreclosure of the security for a specifically devised obligation.

**History: En. 91A-2-608 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-2-608.**

**72-2-517. Changes in devised securities — distributions prior to death.** (1) If the testator intended a specific devise of certain securities rather than the equivalent value thereof, the specific devisee is entitled only to:

(a) as much of the devised securities as is a part of the estate at time of the testator's death;

(b) any additional or other securities of the same entity owned by the testator by reason of action initiated by the entity;

(c) securities of another entity owned by the testator as a result of a merger, consolidation, reorganization, or other similar action initiated by the entity; and

(d) any additional securities of the entity owned by the testator as a result of a plan of reinvestment if it is a regulated investment company.

(2) Distributions prior to death with respect to a specifically devised security not provided for in subsection (1) are not part of the specific devise.

**History: En. 91A-2-607 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-2-607.**

**72-2-518. No implied exercise of power of appointment.** A general residuary clause in a will or a will making general disposition of all of the testator's property does not exercise a power of appointment held by the testator unless specific reference is made to the power or there is some other indication of intention to include the property subject to the power.

**History: En. 91A-2-610 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-2-610.**

**72-2-519. Penalty clause for contest unenforceable.** A provision in a will purporting to penalize any interested person for contesting the will or instituting other proceedings relating to the estate is unenforceable if probable cause exists for instituting proceedings.

**History: En. 91A-3-905 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-3-905.**

## Part 6

## Wills — Unintentional Omission of Spouse or Child

**72-2-601. Omitted spouse.** (1) If a testator fails to provide by will for his surviving spouse who married the testator after the execution of the will, the omitted spouse shall receive the same share of the estate he would have received if the decedent left no will unless it appears from the will that the omission was intentional or the testator provided for the spouse by transfer outside the will and the intent that the transfer be in lieu of a testamentary provision is shown by statements of the testator or from the amount of the transfer or other evidence.

(2) In satisfying a share provided by this section, the devises made by the will abate as provided in 72-3-901.

**History: En. 91A-2-301 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-2-301.**

**72-2-602. Pretermitted child.** (1) If a testator fails to provide in his will for any of his children born or adopted after the execution of his will, the omitted child receives a share in the estate equal in value to that which he would have received if the testator had died intestate unless:

(a) it appears from the will that the omission was intentional;

(b) when the will was executed the testator had one or more children and devised substantially all his estate to the other parent of the omitted child; or

(c) the testator provided for the child by transfer outside the will and the intent that the transfer be in lieu of a testamentary provision is shown by statements of the testator or from the amount of the transfer or other evidence.

(2) If at the time of execution of the will the testator fails to provide in his will for a living child solely because he believes the child to be dead, the child receives a share in the estate equal in value to that which he would have received if the testator had died intestate.

(3) In satisfying a share provided by this section, the devises made by the will abate as provided in 72-3-901.

**History: En. 91A-2-302 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-2-302.**

## Part 7

## Elective Share of Surviving Spouse

**72-2-701. Dower and curtesy abolished.** The estates of dower and curtesy are abolished.

**History: En. 91A-2-112 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-2-112.**

**72-2-702. Right to elective share.** (1) If a married person domiciled in this state dies, the surviving spouse has a right of election to take an elective share of one-third of the augmented estate under the limitations and conditions hereinafter stated.

(2) If a married person not domiciled in this state dies, the right, if any, of the surviving spouse to take an elective share in property in this state is governed by the law of the decedent's domicile at death.

**History: En. 91A-2-201 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-2-201.**

**72-2-703. Right of election personal to surviving spouse.** The right of election of the surviving spouse may be exercised only by him. In the case of a protected person, the right of election may be exercised only by order of the court in which protective proceedings as to his property are pending after finding that exercise is necessary to provide adequate support for the protected person during his probable life expectancy.

**History: En. 91A-2-203 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-2-203.**

**72-2-704. Effect of election on benefits by will or statute.** (1) The surviving spouse's election of his elective share does not affect the share of the surviving spouse under the provisions of the decedent's will or intestate succession unless the surviving spouse also expressly renounces in the petition for an elective share the benefit of all or any of the provisions. If any provision is so renounced, the property or other benefit which would otherwise have passed to the surviving spouse thereunder is treated, subject to contribution under 72-2-706(2), as if the surviving spouse had predeceased the testator.

(2) A surviving spouse is entitled to homestead allowance, exempt property, and family allowance whether or not he elects to take an elective share.

**History: En. 91A-2-206 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-2-206.**

**72-2-705. Augmented estate.** The augmented estate means the estate, reduced by funeral and administration expenses, homestead allowance, family allowances and exemptions, and enforceable claims, to which is added the sum of the following amounts:

(1) the value of property transferred by the decedent at any time during marriage, to or for the benefit of any person other than the surviving spouse, to the extent that the decedent did not receive adequate and full consideration in money or money's worth for the transfer, if the transfer is of any of the following types:

(a) any transfer under which the decedent retained at the time of his death the possession or enjoyment of or right to income from the property;

(b) any transfer to the extent that the decedent retained at the time of his death a power, either alone or in conjunction with any other person, to revoke or to consume, invade, or dispose of the principal for his own benefit;

(c) any transfer whereby property is held at the time of decedent's death by decedent and another with right of survivorship;

(d) any transfer made within 3 years of death of the decedent to the extent that the aggregate transfers to any one donee in any of the years exceed $3,000;

(2) any transfer is excluded if made with the written consent or joinder of the surviving spouse. Property is valued as of the decedent's death except that property given irrevocably to a donee during lifetime of the decedent is valued as of the date the donee came into possession or enjoyment if that occurs first. Nothing herein shall cause to be included in the augmented estate any life insurance, accident insurance, joint annuity, or pension payable to a person other than the surviving spouse.

(3) the value of property owned by the surviving spouse at the decedent's death, plus the value of property transferred by the spouse at any time during marriage to any person other than the decedent which would have been includible in the spouse's augmented estate if the surviving spouse had predeceased the decedent, to the extent the owned or transferred property is derived from the decedent by any means other than testate or intestate succession without a full consideration in money or money's worth. For purposes of this subsection:

(a) property derived from the decedent includes but is not limited to any beneficial interest of the surviving spouse in a trust created by the decedent during his lifetime, any property appointed to the spouse by the decedent's exercise of a general or special power of appointment also exercisable in favor of others than the spouse, any proceeds of insurance (including accidental death benefits) on the life of the decedent attributable to premiums paid by him, any lump sum immediately payable and the commuted value of the proceeds of annuity contracts under which the decedent was the primary annuitant attributable to premiums paid by him, the commuted value of accounts payable after the decedent's death under any public or private pension, disability compensation, death benefit, or retirement plan, exclusive of the federal social security system, by reason of service performed or disabilities incurred by the decedent, and the value of the share of the surviving spouse resulting from rights in community property in this or any other state formerly owned with the decedent. Premiums paid by the decedent's employer, his partner, a partnership of which he was a member, or his creditors are deemed to have been paid by the decedent.

(b) property owned by the spouse at the decedent's death is valued as of the date of death. Property transferred by the spouse is valued at the time the transfer became irrevocable or at the decedent's death, whichever occurred first.

(c) income earned by included property prior to the decedent's death is not treated as property derived from the decedent. Property owned by the surviving spouse as of the decedent's death or previously transferred by the surviving spouse is presumed to have been derived from the decedent, except to the extent that the surviving spouse establishes that it was derived from another source.

**History: En. 91A-2-202 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-2-202.**

**72-2-706. Charging spouse with property received — liability of others for balance of elective share.** (1) In the proceeding for an elective share, property which is part of the augmented estate which passes or has passed to the surviving spouse by testate or intestate succession or other means and which has not been renounced, including that described in 72-2-705(3), is applied first to satisfy the elective share and to reduce the amount due from other recipients of portions of the augmented estate.

(2) Remaining property of the augmented estate is so applied that liability for the balance of the elective share of the surviving spouse is equitably apportioned among the recipients of the augmented estate in proportion to the value of their interests therein.

(3) Only original transferees from or appointees of the decedent and their donees, to the extent the donees have the property or its proceeds, are subject to the contribution to make up the elective share of the surviving spouse. A person liable to contribution may choose to give up the property transferred to him or to pay its value as of the time it is considered in computing the augmented estate.

**History: En. 91A-2-207 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-2-207.**

**72-2-707. Procedure for making of election.** (1) The surviving spouse may elect to take his elective share in the augmented net estate by filing in the court and mailing or delivering to the personal representative, if any, a petition for the elective share within 6 months after the first publication of notice to creditors for filing claims which arose before the death of the decedent or within 1 year of the date of death, whichever time limitation first expires. The court may extend the time for election as it sees fit for cause shown by the surviving spouse before the time for election has expired.

(2) The surviving spouse shall give notice of the time and place set for hearing to persons interested in the estate and to the distributees and recipients of portions of the augmented net estate whose interests will be adversely affected by the taking of the elective share.

(3) The surviving spouse may withdraw his demand for an elective share at any time before entry of a final determination by the court.

(4) After notice and hearing, the court shall determine the amount of the elective share and shall order its payment from the assets of the augmented net estate or by contribution as appears appropriate under 72-2-706. If it appears that a fund or property included in the augmented net estate has not come into the possession of the personal representative or has been distributed by the personal representative, the court nevertheless shall fix the liability of any person who has any interest in the fund or property or who has possession thereof, whether as trustee or otherwise. The proceeding may be maintained against fewer than all persons against whom relief could be sought, but no person is subject to contribution in any greater

amount than he would have been if relief had been secured against all persons subject to contribution.

(5) The order or judgment of the court may be enforced as necessary in suit for contribution or payment in other courts of this state or other jurisdictions.

**History: En. 91A-2-205 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-2-205.**

## Part 8

## Exempt Property and Allowances

**72-2-801. Homestead allowance.** (1) A surviving spouse of a decedent who was domiciled in this state is entitled to a homestead allowance of $20,000. If there is no surviving spouse, each minor child and each dependent child of the decedent is entitled to a homestead allowance amounting to $20,000, divided by the number of minor and dependent children of the decedent.

(2) The homestead allowance is exempt from and has priority over all claims against the estate.

(3) Homestead allowance is in addition to any share passing to the surviving spouse or minor or dependent child by the will of the decedent unless otherwise provided, by intestate succession, or by way of elective share.

**History: En. 91A-2-401 by Sec. 1, Ch. 365, L. 1974; amd. Sec. 1, Ch. 153, L. 1977; R.C.M. 1947, 91A-2-401.**

**72-2-802. Exempt property.** (1) In addition to the homestead allowance, the surviving spouse of a decedent who was domiciled in this state is entitled from the estate to value not exceeding $3,500 in excess of any security interests therein in household furniture, automobiles, furnishings, appliances, and personal effects. If there is no surviving spouse, children of the decedent are entitled jointly to the same value. If encumbered chattels are selected and if the value in excess of security interests, plus that of other exempt property, is less than $3,500 or if there is not $3,500 worth of exempt property in the estate, the spouse or children are entitled to other assets of the estate, if any, to the extent necessary to make up the $3,500 value.

(2) Rights to exempt property and assets needed to make up a deficiency of exempt property have priority over all claims against the estate, except that the right to any assets to make up a deficiency of exempt property shall abate as necessary to permit prior payment of homestead allowance and family allowance.

(3) These rights are in addition to any benefit or share passing to the surviving spouse or children by the will of the decedent unless otherwise provided, by intestate succession, or by way of elective share.

**History: En. 91A-2-402 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-2-402.**

**72-2-803. Family allowance.** (1) In addition to the right to homestead allowance and exempt property, if the decedent was domiciled in this state, the surviving spouse and minor children whom the decedent was obligated to support and children who were in fact being supported by him are entitled to a reasonable allowance in money out of the estate for their maintenance during the period of administration, which allowance may not continue for longer than 1 year if the estate is inadequate to discharge allowed claims. The allowance may be paid as a lump sum or in periodic installments.

(2) It is payable to the surviving spouse, if living, for the use of the surviving spouse and minor and dependent children, otherwise to the children or persons

having their care and custody; but in case any minor child or dependent child is not living with the surviving spouse, the allowance may be made partially to the child or his guardian or other person having his care and custody and partially to the spouse, as their needs may appear.

(3) The family allowance is exempt from and has priority over all claims but not over the homestead allowance.

(4) The family allowance is not chargeable against any benefit or share passing to the surviving spouse or children by the will of the decedent unless otherwise provided, by intestate succession, or by way of elective share.

(5) The death of any person entitled to family allowance terminates his right to allowances not yet paid.

**History: En. 91A-2-403 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-2-403.**

**72-2-804. Source, determination, and documentation.** (1) If the estate is otherwise sufficient, property specifically devised is not used to satisfy rights to homestead and exempt property. Subject to this restriction, the surviving spouse, the guardians of the minor children, or children who are adults may select property of the estate as homestead allowance and exempt property. The personal representative may make these selections if the surviving spouse, the children, or the guardians of the minor children are unable or fail to do so within a reasonable time or if there are no guardians of the minor children. The personal representative may execute an instrument or deed of distribution to establish the ownership of property taken as homestead allowance or exempt property. He may determine the family allowance in a lump sum not exceeding $6,000 or periodic installments not exceeding $500 per month for 1 year and may disburse funds of the estate in payment of the family allowance and any part of the homestead allowance payable in cash.

(2) The personal representative or any interested person aggrieved by any selection, determination, payment, proposed payment, or failure to act under this section may petition the court for appropriate relief, which relief may provide a family allowance larger or smaller than that which the personal representative determined or could have determined.

**History: En. 91A-2-404 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-2-404.**

# CHAPTER 3

# UPC — PROBATE AND ADMINISTRATION

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## Part 1

## General Provisions

**72-3-101. Devolution of estate at death — restrictions.** (1) The power of a person to leave property by will and the rights of creditors, devisees, and heirs to his property are subject to the restrictions and limitations contained in this code to facilitate the prompt settlement of estates.

(2) Upon the death of a person, his real and personal property devolves to the persons to whom it is devised by his last will or to those indicated as substitutes for them in cases involving lapse, renunciation, or other circumstances affecting the devolution of testate estates or, in the absence of testamentary disposition, to his heirs or to those indicated as substitutes for them in cases involving renunciation or other circumstances affecting devolution of intestate estates, subject to homestead allowance, exempt property, and family allowance, to rights of creditors, elective share of the surviving spouse, and to administration.

**History: En. 91A-3-101 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-3-101.**

**72-3-102. Necessity of probate of will.** Except as provided in 72-3-1101, to be effective to prove the transfer of any property or to nominate an executor, a will must be declared to be valid by an order of informal probate by the clerk or an adjudication of probate by the court, except that a duly executed and unrevoked will which has not been probated may be admitted as evidence of a devise if:

(1) no court proceeding concerning the succession or administration of the estate has occurred; and

(2) either:

(a) the devisee or his successors and assigns possessed the property devised in accordance with the provisions of the will; or

(b) the property devised was not possessed or claimed by anyone by virtue of the decedent's title during the time period for testacy proceedings.

**History: En. 91A-3-102 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-3-102.**

**72-3-103. Necessity of appointment for administration.** Except as otherwise provided in chapter 4, to acquire the powers and undertake the duties and liabilities of a personal representative of a decedent, a person must be appointed by order of the court or clerk, qualify, and be issued letters. Administration of an estate is commenced by the issuance of letters.

**History: En. 91A-3-103 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-3-103.**

**72-3-104. Claims against decedent — necessity of administration.** (1) No proceeding to enforce a claim against the estate of a decedent or his successors may be revived or commenced before the appointment of a personal representative. After the appointment and until distribution, all proceedings and actions to enforce a claim against the estate are governed by the procedure prescribed by 72-3-101 through 72-3-1103. After distribution a creditor whose claim has not been barred may recover from the distributees as provided in 72-3-1012 or from a former personal representative individually liable as provided in 72-3-1014.

(2) This section has no application to a proceeding by a secured creditor of the decedent to enforce his right to his security except as to any deficiency judgment which might be sought therein.

**History: En. 91A-3-104 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-3-104.**

**72-3-105. Interested persons' rights of application and petition.** Persons interested in decedent's estate may apply to the clerk for determination in the informal proceedings provided in chapter 3, part 2, and may petition the court for orders in formal proceedings within the court's jurisdiction, including but not limited to those described in chapter 3, parts 3 and 4.

**History: En. 91A-3-105 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-3-105(part).**

**72-3-106. Interested person's right to demand notice of order or filing.** (1) Any person desiring notice of any order or filing pertaining to a decedent's estate in which he has a financial or property interest may file a demand for notice with the court at any time after the death of the decedent stating:

(a) the name of the decedent;

(b) the nature of his interest in the estate; and

(c) the demandant's address or that of his attorney.

(2) The clerk shall mail a copy of the demand to the personal representative if one has been appointed.

(3) After filing of a demand, no order or filing to which the demand relates shall be made or accepted without notice as prescribed in 72-1-301 to the demandant or his attorney. The validity of an order which is issued or filing which is accepted without compliance with this requirement shall not be affected by the error, but the petitioner receiving the order or the person making the filing may be liable for any damage caused by the absence of notice.

(4) The requirement of notice arising from a demand under this provision may be waived in writing by the demandant and shall cease upon the termination of his interest in the estate.

**History: En. 91A-3-204 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-3-204.**

**72-3-107 through 72-3-110 reserved.**

**72-3-111. Exclusive jurisdiction of court — binding nature of orders after notice.** (1) The district court has exclusive jurisdiction of all probate matters.

(2) In proceedings within the exclusive jurisdiction of the court where notice is required by this code or by rule, interested persons may be bound by the orders of the court in respect to property in or subject to the laws of this state by notice in conformity with 72-1-301. An order is binding as to all who are given notice of the proceeding though less than all interested persons are notified.

**History: En. 91A-3-105, 91A-3-106 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-3-105(part), 91A-3-106.**

**72-3-112. Venue for estate proceedings.** (1) Venue for the first informal or formal testacy or appointment proceedings after a decedent's death is:

(a) in the county where the decedent had his domicile at the time of his death; or

(b) if the decedent was not domiciled in this state, in any county where property of the decedent was located at the time of his death.

(2) Venue for all subsequent proceedings within the exclusive jurisdiction of the court is in the place where the initial proceeding occurred unless the initial proceeding has been transferred as provided in 72-1-203 or subsection (3) of this section.

(3) If the first proceeding was informal, on application of an interested person and after notice to the proponent in the first proceeding, the court, upon finding that venue is elsewhere, may transfer the proceeding and the file to the other court.

**History: En. 91A-3-201 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-3-201(1) thru (3).**

**72-3-113. Rules for determining location of property.** (1) For the purpose of aiding determinations concerning location of assets which may be relevant in cases involving nondomiciliaries, a debt, other than one evidenced by investment or commercial paper or other instrument in favor of a nondomiciliary, is located where the debtor resides or, if the debtor is a person other than an individual, at the place where it has its principal office.

(2) Commercial paper, investment paper, and other instruments are located where the instrument is.

(3) An interest in property held in trust is located where the trustee may be sued.

**History: En. 91A-3-201 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-3-201(4).**

**72-3-114. Conflicting claim as to domicile in another state.** If conflicting claims as to the domicile of a decedent are made in a formal testacy or appointment proceeding commenced in this state and in a testacy or appointment proceeding after notice pending at the same time in another state, the court of this state must stay, dismiss, or permit suitable amendment in the proceeding here unless it is determined that the local proceeding was commenced before the proceeding elsewhere. The determination of domicile in the proceeding first commenced must be accepted as determinative in the proceeding in this state.

**History: En. 91A-3-202 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-3-202.**

**72-3-115 through 72-3-120 reserved.**

**72-3-121. Scope of proceedings when no supervised administration — proceedings independent — combination of proceedings.** Unless supervised administration as described in chapter 3, part 4, is involved:

(1) each proceeding before the court or clerk is independent of any other proceeding involving the same estate;

(2) petitions for formal orders of the court may combine various requests for relief in a single proceeding if the orders sought may be finally granted without delay. Except as required for proceedings which are particularly described by other sections of this code, no petition is defective because it fails to embrace all matters which might then be the subject of a final order.

(3) proceedings for probate of wills or adjudications of no will may be combined with proceedings for appointment of personal representatives; and

(4) a proceeding for appointment of a personal representative is concluded by an order making or declining the appointment.

**History: En. 91A-3-107 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-3-107.**

**72-3-122. Time limit on probate, testacy, and appointment proceedings — exceptions.** (1) No informal probate or appointment proceeding or formal testacy or appointment proceeding, other than a proceeding to probate a will previously probated at the testator's domicile and appointment proceedings relating to an estate in which there has been a prior appointment, may be commenced more than 3 years after the decedent's death, except:

(a) if a previous proceeding was dismissed because of doubt about the fact of the decedent's death, appropriate probate, appointment, or testacy proceedings may be maintained at any time thereafter upon a finding that the decedent's death occurred prior to the initiation of the previous proceeding and the applicant or petitioner has not delayed unduly in initiating the subsequent proceeding;

(b) appropriate probate, appointment, or testacy proceedings may be maintained in relation to the estate of an absent, disappeared, or missing person for whose estate a conservator has been appointed at any time within 3 years after the conservator becomes able to establish the death of the protected person; and

(c) a proceeding to contest an informally probated will and to secure appointment of the person with legal priority for appointment in the event the contest is successful may be commenced within the later of 12 months from the informal probate or 3 years from the decedent's death.

(2) These limitations do not apply to proceedings to construe probated wills or determine heirs of an intestate, nor do they limit the right of interested persons to commence informal probate or appointment proceedings or formal testacy or appointment proceedings at any time after 3 years from the decedent's death if there have been no previous formal or informal probate or appointment proceedings commenced in respect of that decedent.

(3) In cases under (1)(a) or (1)(b) above, the date on which a testacy or appointment proceeding is properly commenced shall be deemed to be the date of the decedent's death for purposes of other limitations provisions of this code which relate to the date of death.

**History: En. 91A-3-108 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-3-108.**

**72-3-123. Statutes of limitation on decedent's cause of action — applicability.** No statute of limitation running on a cause of action belonging to a decedent, which had not been barred as of the date of his death, shall apply to bar a cause of action surviving the decedent's death sooner than 4 months after death. A cause of action which, but for this section, would have been barred less than 4 months after death is barred after 4 months unless tolled.

**History: En. 91A-3-109 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-3-109.**

**72-3-124 through 72-3-130 reserved.**

**72-3-131. Compromise of controversies.** (1) A compromise of any controversy as to admission to probate of any instrument offered for formal probate as the will of a decedent, the construction, validity, or effect of any probate will, the rights or interests in the estate of the decedent, of any successor, or the administration of the estate, if approved in a formal proceeding in the court for that purpose, is binding on all the parties thereto, including those unborn, unascertained, or who could not be located.

(2) An approved compromise is binding even though it may affect a trust or an inalienable interest. A compromise does not impair the rights of creditors or of taxing authorities who are not parties to it.

**History: En. 91A-3-1101 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-3-1101.**

**72-3-132. Procedure for securing court approval of compromise.** The procedure for securing court approval of a compromise is as follows:

(1) The terms of the compromise shall be set forth in an agreement in writing which shall be executed by all competent persons and parents acting for any minor child having beneficial interests or having claims which will or may be affected by the compromise. Execution is not required by any person whose identity cannot be ascertained or whose whereabouts is unknown and cannot reasonably be ascertained.

(2) Any interested person, including the personal representative or a trustee, then may submit the agreement to the court for its approval and for execution by the personal representative, the trustee of every affected testamentary trust, and other fiduciaries and representatives.

(3) After notice to all interested persons or their representatives, including the personal representative of the estate and all affected trustees of trusts, the court, if it finds that the contest or controversy is in good faith and that the effect of the agreement upon the interests of persons represented by fiduciaries or other representatives is just and reasonable, shall make an order approving the agreement and directing all fiduciaries under its supervision to execute the agreement. Minor children represented only by their parents may be bound only if their parents join with other competent persons in execution of the compromise.

(4) Upon the making of the order and the execution of the agreement, all further disposition of the estate is in accordance with the terms of the agreement.

**History: En. 91A-3-1102 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-3-1102.**

## Part 2

## Informal Probate and Appointment Proceedings

**72-3-201. Applications to be verified.** Applications for informal probate or informal appointment shall be directed to the clerk and verified by the applicant to be accurate and complete to the best of his knowledge and belief as to the information required by 72-3-202 through 72-3-205.

**History: En. 91A-3-301 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-3-301(part).**

**72-3-202. Required contents of application.** Every application for informal probate of a will or for informal appointment of a personal representative, other than a special, ancillary, or successor representative, shall contain the following:

(1) a statement of the interest of the applicant;

(2) the name and date of death of the decedent, his age, and the county and state of his domicile at the time of death and the names and addresses of the spouse, children, heirs, and devisees and the ages of any who are minors so far as known or ascertainable with reasonable diligence by the applicant;

(3) if the decedent was not domiciled in the state at the time of his death, a statement showing venue;

(4) a statement identifying and indicating the address of any personal representative of the decedent appointed in this state or elsewhere whose appointment has not been terminated;

(5) a statement indicating whether the applicant has received a demand for notice or is aware of any demand for notice of any probate or appointment proceeding concerning the decedent that may have been filed in this state or elsewhere.

**History: En. 91A-3-301 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-3-301(1).**

**72-3-203. Probate and appointment under will — additional information required.** (1) An application for informal probate of a will shall state the following in addition to the statements required by 72-3-202:

(a) that the original of the decedent's last will is in the possession of the court or accompanies the application or that an authenticated copy of a will probated in another jurisdiction accompanies the application;

(b) that the applicant to the best of his knowledge believes the will to have been validly executed;

(c) that after the exercise of reasonable diligence, the applicant is unaware of any instrument revoking the will and that the applicant believes that the instrument which is the subject of the application is the decedent's last will;

(d) that the time limit for informal probate as provided in this chapter has not expired either because 3 years or less have passed since the decedent's death or, if more than 3 years from death have passed, that circumstances as described by 72-3-122 authorizing tardy probate have occurred.

(2) An application for informal appointment of a personal representative to administer an estate under a will shall describe the will by date of execution and state the time and place of probate or the pending application or petition for probate. The application for appointment shall adopt the statements in the application or petition for probate and state the name, address, and priority for appointment of the person whose appointment is sought.

**History: En. 91A-3-301 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-3-301(2), (3).**

**72-3-204. Appointment in intestacy — additional information required.** An application for informal appointment of an administrator in intestacy shall state in addition to the statements required by 72-3-202:

(1) that after the exercise of reasonable diligence, the applicant is unaware of any unrevoked testamentary instrument relating to property having a situs in this state under 72-1-201 or a statement why any such instrument of which he may be aware is not being probated;

(2) the priority of the person whose appointment is sought and the names of any other persons having a prior or equal right to the appointment under 72-3-501 through 72-3-508.

**History: En. 91A-3-301 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-3-301(4).**

**72-3-205. Application for appointment of successor personal representative.** (1) An application for appointment of a personal representative to succeed a personal representative appointed under a different testacy status shall refer to the order in the most recent testacy proceeding, state the name and address of the person whose appointment is sought and of the person whose appointment will be terminated if the application is granted, and describe the priority of the applicant.

(2) An application for appointment of a personal representative to succeed a personal representative who has tendered a resignation as provided in 72-3-525 or whose appointment has been terminated by death or removal shall adopt the statements in the application or petition which led to the appointment of the person being succeeded except as specifically changed or corrected, state the name and address of the person who seeks appointment as successor, and describe the priority of the applicant.

**History: En. 91A-3-301 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-3-301(5), (6).**

**72-3-206 through 72-3-210 reserved.**

**72-3-211. Informal probate — notice requirements.** (1) The moving party must give notice as described by 72-1-301 of his application for informal probate:

(a) to any person demanding it pursuant to 72-3-106; and

(b) to any personal representative of the decedent whose appointment has not been terminated.

(2) No other notice of informal probate is required.

**History: En. 91A-3-306 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-3-306.**

**72-3-212. Informal probate — clerk to make findings.** In an informal proceeding for original probate of a will, the clerk shall determine whether:

(1) the application is complete;

(2) the applicant has made oath or affirmation that the statements contained in the application are true to the best of his knowledge and belief;

(3) the applicant appears from the application to be an interested person as defined in 72-1-103(21);

(4) on the basis of the statements in the application, venue is proper;

(5) an original, duly executed, and apparently unrevoked will is in the clerk's possession;

(6) any notice required by 72-3-106 has been given and that the application is not within 72-3-213(5); and

(7) it appears from the application that the time limit for original probate has not expired.

**History: En. 91A-3-303 by Sec. 1, Ch. 365, L. 1974; amd. Sec. 2, Ch. 516, L. 1975; R.C.M. 1947, 91A-3-303(1).**

**72-3-213. Rules for grant or denial of informal probate.** (1) A will which appears to have the required signatures and which contains an attestation clause showing that requirements of execution under 72-2-302, 72-2-303, or 72-2-306 have been met shall be probated without further proof. In other cases the clerk may assume execution if the will appears to be properly executed, or he may accept a sworn statement or affidavit of any person having knowledge of the circumstances of execution, whether or not the person was a witness to the will.

(2) The application shall be denied if it indicates that a personal representative has been appointed in another county of this state or, except as provided in subsection (3) below, if it appears that this or another will of the decedent has been the subject of a previous probate order.

(3) Informal probate of a will which has been previously probated elsewhere may be granted at any time upon written application by any interested person, together with deposit of an authenticated copy of the will and of the statement probating it from the office or court where it was first probated.

(4) A will from a place which does not provide for probate of a will after death and which is not eligible for probate under 72-3-212 may be probated in this state upon receipt by the clerk of a duly authenticated copy of the will and a duly authenticated certificate of its legal custodian that the copy filed is a true copy and that the will has become operative under the law of the other place.

(5) Application for informal probate which relates to one or more of a known series of testamentary instruments (other than wills and codicils), the latest of which does not expressly revoke the earlier, shall be declined.

**History: (1) thru (4)En. 91A-3-303 by Sec. 1, Ch. 365, L. 1974; amd. Sec. 2, Ch. 516, L. 1975; Sec. 91A-3-303, R.C.M. 1947; (5)En. 91A-3-304 by Sec. 1, Ch. 365, L. 1974; Sec. 91A-3-304, R.C.M. 1947; R.C.M. 1947, 91A-3-303(2) thru (5), 91A--3-304.**

**72-3-214. Power of clerk to deny informal probate — effect of denial.** (1) If the clerk is not satisfied that a will is entitled to be probated in informal proceedings because of failure to meet the requirements of 72-3-212 and 72-3-213 or any other reason, he may decline the application.

(2) A declination of informal probate is not an adjudication and does not preclude formal probate proceedings.

**History: En. 91A-3-305 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-3-305.**

**72-3-215. Clerk to issue statement of informal probate — effect — procedural defect not to void probate.** (1) Upon receipt of an application requesting informal probate of a will, the clerk, upon making the findings required by 72-3-212 and 72-3-213, shall issue a written statement of informal probate if at least 120 hours have elapsed since the decedent's death.

(2) Informal probate is conclusive as to all persons until superseded by an order in a formal testacy proceeding.

(3) No defect in the application or procedure relating thereto which leads to informal probate of a will renders the probate void.

**History: En. 91A-3-302 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-3-302.**

**72-3-216 through 72-3-220 reserved.**

**72-3-221. Informal appointment — notice requirements.** (1) The moving party must give notice as described by 72-1-301 of his intention to seek an appointment informally:

(a) to any person demanding it pursuant to 72-3-106; and

(b) to any person having a prior or equal right to appointment not waived in writing and filed with the court.

(2) No other notice of an informal appointment proceeding is required.

**History: En. 91A-3-310 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-3-310.**

**72-3-222. Informal appointment — clerk to make findings.** In informal appointment proceedings, the clerk must determine whether:

(1) the application for informal appointment of a personal representative is complete;

(2) the applicant has made oath or affirmation that the statements contained in the application are true to the best of his knowledge and belief;

(3) the applicant appears from the application to be an interested person as defined in 72-1-103(21);

(4) on the basis of the statements in the application, venue is proper;

(5) any will to which the requested appointment relates has been formally or informally probated, but this requirement does not apply to the appointment of a special administrator;

(6) any notice required by 72-3-106 has been given;

(7) from the statements in the application, the person whose appointment is sought has priority entitling him to the appointment.

**History: En. 91A-3-308 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-3-308(1).**

**72-3-223. Rules for denial of informal appointment.** (1) Unless 72-3-523 controls, the application must be denied if it indicates:

(a) that a personal representative who has not filed a written statement of resignation as provided in 72-3-525 has been appointed in this or another county of this state;

(b) that (unless the applicant is the domiciliary personal representative or his nominee) the decedent was not domiciled in this state and that a personal representative whose appointment has not been terminated has been appointed by a court in the state of domicile; or

(c) that other requirements of 72-3-222 have not been met.

(2) If an application for informal appointment indicates the existence of a possible unrevoked testamentary instrument which may relate to property subject to the laws of this state and which is not filed for probate in this court, the clerk shall decline the application.

**History: En. 91A-3-308, 91A-3-311 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-3-308(2), 91A-3-311.**

**72-3-224. Informal appointment — power of clerk to deny — effect of denial.** (1) If the clerk is not satisfied that a requested informal appointment of a personal representative should be made because of failure to meet the requirements of 72-3-222, 72-3-223, and 72-3-225 or for any other reason, he may decline the application.

(2) A declination of informal appointment is not an adjudication and does not preclude appointment in formal proceedings.

**History: En. 91A-3-309 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-3-309.**

**72-3-225. Duty of clerk to make appointment — effect.** (1) Upon receipt of an application for informal appointment of a personal representative other than a special administrator as provided in 72-3-701, if at least 120 hours have elapsed since the decedent's death, the clerk, after making the findings required by 72-3-222 and 72-3-223, shall appoint the applicant subject to qualification and acceptance, provided that if the decedent was a nonresident, the clerk shall delay the order of appointment until 30 days have elapsed since death unless the personal representative appointed at the decedent's domicile is the applicant or unless the decedent's will directs that his estate be subject to the laws of this state.

(2) The status of personal representative and the powers and duties pertaining to the office are fully established by informal appointment. An appointment and the office of personal representative created thereby is subject to termination as provided in 72-3-521 through 72-3-526 but is not subject to retroactive vacation.

**History: En. 91A-3-307 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-3-307.**

## Part 3

## Formal Testacy and Appointment Proceedings

**72-3-301. Petition for formal testacy or appointment — contents — last will.** (1) Petitions for formal probate of a will or for adjudication of intestacy with or without request for appointment of a personal representative must be directed to the court, request a judicial order after notice and hearing, and contain further statements as indicated in this section. A petition for formal probate of a will:

(a) requests an order as to the testacy of the decedent in relation to a particular instrument which may or may not have been informally probated and determining the heirs;

(b) contains the statements required for informal applications as stated in the five subsections under 72-3-202, the statements required by subsections (b) and (c) of 72-3-203(1); and

(c) states whether the original of the last will of the decedent is in the possession of the court or accompanies the petition. If the original will is neither in the possession of the court nor accompanies the petition and no authenticated copy of a will probated in another jurisdiction accompanies the petition, the petition also must state the contents of the will and indicate that it is lost, destroyed, or otherwise unavailable.

(2) A petition for adjudication of intestacy and appointment of an administrator in intestacy must request a judicial finding and order that the decedent left no will and determining the heirs, contain the statements required by 72-3-202 and 72-3-204, and indicate whether supervised administration is sought. A petition may request an order determining intestacy and heirs without requesting the appointment of an administrator, in which case the statements required by 72-3-204(2) may be omitted.

**History: En. 91A-3-402 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-3-402.**

**72-3-302. Formal testacy proceedings — nature — how and when commenced.** (1) A formal testacy proceeding is litigation to determine whether a decedent left a valid will.

(2) A formal testacy proceeding may be commenced by an interested person filing a petition:

(a) as described in 72-3-301(1) in which he requests that the court, after notice and hearing, enter an order probating a will;

(b) to set aside an informal probate of a will or to prevent informal probate of a will which is the subject of a pending application; or

(c) for an order that the decedent died intestate.

(3) A petition may seek formal probate of a will without regard to whether the same or a conflicting will has been informally probated.

(4) A formal testacy proceeding may but need not involve a request for appointment of a personal representative.

**History: En. 91A-3-401 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-3-401(part).**

**72-3-303. Formal proceeding supersedes all informal applications.** During the pendency of a formal testacy proceeding, the clerk shall not act upon any application for informal probate of any will of the decedent or any application for informal appointment of a personal representative of the decedent.

**History: En. 91A-3-401 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-3-401(part).**

**72-3-304. Effect of formal proceeding on power of informally appointed personal representative.** Unless a petition in a formal testacy proceeding also requests confirmation of the previous informal appointment, a previously appointed personal representative, after receipt of notice of the commencement of a formal probate proceeding, must refrain from exercising his power to make any further distribution of the estate during the pendency of the formal proceeding. A petitioner who seeks the appointment of a different personal representative in a formal proceeding also may request an order restraining the acting personal representative from exercising any of the powers of his office and requesting the appointment of a special administrator. In the absence of a request or if the request is denied, the commencement of a formal proceeding has no effect on the powers and duties of a previously appointed personal representative other than those relating to distribution.

**History: En. 91A-3-401 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-3-401(part).**

**72-3-305. Notice of hearing on petition for formal testacy proceeding.** (1) Upon commencement of a formal testacy proceeding, the court or clerk shall fix a time and place of hearing.

(2) Notice shall be given in the manner prescribed by 72-1-301 by the petitioner to the persons herein enumerated and to any additional person who has filed a demand for notice under 72-3-106 of this code. Notice shall be given to the following persons:

(a) the surviving spouse, children, and other heirs of the decedent;

(b) the devisees and executors named in any will that is being or has been probated or offered for informal or formal probate in the county or that is known by the petitioner to have been probated or offered for informal or formal probate elsewhere; and

(c) any personal representative of the decedent whose appointment has not been terminated.

(3) In addition, the petitioner shall give notice by publication to all unknown persons and to all known persons whose addresses are unknown who have any interest in the matters being litigated.

(4) Notice may be given to other persons.

**History: En. 91A-3-403 by Sec. 1, Ch. 365, L. 1974; amd. Sec. 3, Ch. 516, L. 1975; R.C.M. 1947, 91A-3-403(1).**

**72-3-306. Notice and procedure when fact of death in doubt.** (1) If it appears by the petition or otherwise that the fact of the death of the alleged decedent may be in doubt or on the written demand of any interested person, a copy of the notice of the hearing on said petition shall be sent by registered or certified mail to the alleged decedent at his last known address. The court shall direct the petitioner to report the results of or make and report back concerning a reasonably diligent search for the alleged decedent in any manner that may seem advisable, including any or all of the following methods:

(a) by inserting in one or more suitable periodicals a notice requesting information from any person having knowledge of the whereabouts of the alleged decedent;

(b) by notifying law enforcement officials and public welfare agencies in appropriate locations of the disappearance of the alleged decedent;

(c) by engaging the services of an investigator.

(2) The costs of any search so directed shall be paid by the petitioner if there is no administration or by the estate of the decedent in case there is administration.

**History: En. 91A-3-403 by Sec. 1, Ch. 365, L. 1974; amd. Sec. 3, Ch. 516, L. 1975; R.C.M. 1947, 91A-3-403(2).**

**72-3-307. Hearings and proof in uncontested cases.** If a petition in a testacy proceeding is unopposed, the court may order probate or intestacy on the strength of the pleadings if satisfied that the conditions of 72-3-313 and 72-3-316 have been met or conduct a hearing in open court and require proof of the matters necessary to support the order sought. If evidence concerning execution of the will is necessary, the affidavit or testimony of one of any attesting witnesses to the instrument is sufficient. If the affidavit or testimony of an attesting witness is not available, execution of the will may be proved by other evidence or affidavit.

**History: En. 91A-3-405 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-3-405.**

**72-3-308. Written objections to probate.** Any party to a formal proceeding who opposes the probate of a will for any reason shall state in his pleadings his objections to probate of the will.

**History: En. 91A-3-404 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-3-404.**

**72-3-309. Testimony of attesting witnesses in contested cases — presumptions for self-proved will.** (1) If evidence concerning execution of an attested will which is not self-proved is necessary in contested cases, the testimony of at least one of the attesting witnesses, if within the state competent and able to testify, is required. Due execution of an attested or unattested will may be proved by other evidence.

(2) If the will is self-proved, compliance with signature requirements for execution is conclusively presumed and other requirements of execution are presumed, subject to rebuttal, without the testimony of any witness, upon filing the will and the acknowledgment and affidavits annexed or attached thereto, unless there is proof of fraud or forgery affecting the acknowledgment or affidavit.

**History: En. 91A-3-406 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-3-406.**

**72-3-310. Burdens in contested cases.** In contested cases, petitioners who seek to establish intestacy have the burden of establishing prima facie proof of death, venue, and heirship. Proponents of a will have the burden of establishing prima facie proof of due execution in all cases and, if they are also petitioners, prima facie proof of death and venue. Contestants of a will have the burden of establishing lack of testamentary intent or capacity, undue influence, fraud, duress, mistake, or revocation. Parties have the ultimate burden of persuasion as to matters with respect to which they have the initial burden of proof.

**History: En. 91A-3-407 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-3-407(part).**

**72-3-311. Priority of determinations in contested cases.** If a will is opposed by the petition for probate of a later will revoking the former, it shall be determined first whether the later will is entitled to probate, and if a will is opposed by a petition for a declaration of intestacy, it shall be determined first whether the will is entitled to probate.

**History: En. 91A-3-407 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-3-407(part).**

**72-3-312. Effect of final order in another state.** A final order of a court of another state determining testacy, the validity or construction of a will, made in a proceeding involving notice to and an opportunity for contest by all interested persons must be accepted as determinative by the courts of this state if it includes or is based upon a finding that the decedent was domiciled at his death in the state where the order was made.

**History: En. 91A-3-408 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-3-408.**

**72-3-313. Order for formal probate.** (1) After the time required for any notice has expired, upon proof of notice, and after any hearing that may be necessary, if the court finds that the testator is dead, venue is proper, and that the proceeding was commenced within the limitation prescribed by 72-3-122, it shall determine the decedent's domicile at death, his heirs, and his state of testacy. Any will found to be valid and unrevoked shall be formally probated.

(2) Termination of any previous informal appointment of a personal representative, which may be appropriate in view of the relief requested and findings, is governed by 72-3-523.

(3) The petition shall be dismissed or appropriate amendment allowed if the court is not satisfied that the alleged decedent is dead.

**History: En. 91A-3-409 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-3-409(part).**

**72-3-314. Probate of more than one instrument — order.** (1) If two or more instruments are offered for probate before a final order is entered in a formal testacy proceeding, more than one instrument may be probated if neither expressly revokes the other or contains provisions which work a total revocation by implication.

(2) If more than one instrument is probated, the order shall indicate what provisions control in respect to the nomination of an executor, if any. The order may but need not indicate how any provisions of a particular instrument are affected by the other instrument. After a final order in a testacy proceeding has been entered, no petition for probate of any other instrument of the decedent may be entertained, except incident to a petition to vacate or modify a previous probate order and subject to the time limits of 72-3-317.

**History: En. 91A-3-410 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-3-410.**

**72-3-315. Order of partial intestacy.** If it becomes evident in the course of a formal testacy proceeding that, though one or more instruments are entitled to be probated, the decedent's estate is or may be partially intestate, the court shall enter an order to that effect.

**History: En. 91A-3-411 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-3-411.**

**72-3-316. Will from place where probate unprovided for.** A will from a place which does not provide for probate of a will after death may be proved for probate in this state by a duly authenticated certificate of its legal custodian that the copy introduced is a true copy and that the will has become effective under the law of the other place.

**History: En. 91A-3-409 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-3-409(part).**

**72-3-317. Effect of formal testacy order — modification or vacation — fact of death — remedies of alleged decedent.** Subject to appeal and subject to vacation as provided herein and in 72-3-318, a formal testacy order under 72-3-313 through 72-3-316, including an order that the decedent left no valid will and determining heirs, is final as to all persons with respect to all issues concerning the decedent's estate that the court considered or might have considered incident to its rendition relevant to the question of whether the decedent left a valid will and to the determination of heirs, except that:

(1) the court shall entertain a petition for modification or vacation of its order and probate of another will of the decedent if it is shown that the proponents of the later-offered will were unaware of its existence at the time of the earlier proceeding or were unaware of the earlier proceeding and were given no notice thereof, except by publication;

(2) if intestacy of all or part of the estate has been ordered, the determination of heirs of the decedent may be reconsidered if it is shown that one or more persons were omitted from the determination and it is also shown that the persons were unaware of their relationship to the decedent, were unaware of his death, or were given no notice of any proceeding concerning his estate, except by publication;

(3) a petition for vacation under either (1) or (2) above must be filed prior to the earlier of the following time limits:

(a) if a personal representative has been appointed for the estate, the time of entry of any order approving final distribution of the estate or, if the estate is closed by statement, 6 months after the filing of the closing statement;

(b) whether or not a personal representative has been appointed for the estate of the decedent, the time prescribed by 72-3-122 when it is no longer possible to initiate an original proceeding to probate a will of the decedent;

(c) 12 months after the entry of the order sought to be vacated;

(4) the order originally rendered in the testacy proceeding may be modified or vacated, if appropriate under the circumstances, by the order of probate of the later-offered will or the order redetermining heirs;

(5) the finding of the fact of death is conclusive as to the alleged decedent only if notice of the hearing on the petition in the formal testacy proceeding was sent by registered or certified mail addressed to the alleged decedent at his last known address and the court finds that a search under 72-3-306 was made. If the alleged decedent is not dead, even if notice was sent and search was made, he may recover estate assets in the hands of the personal representative. In addition to any remedies available to the alleged decedent by reason of any fraud or intentional wrongdoing, the alleged decedent may recover any estate or its proceeds from distributees that is in their hands or the value of distributions received by them, to the extent that any recovery from distributees is equitable in view of all of the circumstances.

**History: En. 91A-3-412 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-3-412.**

**72-3-318. Modification or vacation for other cause.** For good cause shown, an order in a formal testacy proceeding may be modified or vacated within the time allowed for appeal.

**History: En. 91A-3-413 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-3-413.**

**72-3-319. Formal appointment proceedings.** (1) A formal proceeding for adjudication regarding the priority or qualification of one who is an applicant for appointment as personal representative or of one who previously has been appointed personal representative in informal proceedings, if an issue concerning the testacy of the decedent is or may be involved, is governed by 72-3-301 as well as by this section. In other cases, the petition shall contain or adopt the statements required by 72-3-202 and describe the question relating to priority or qualification of the personal representative which is to be resolved. If the proceeding precedes any appointment of a personal representative, it shall stay any pending informal appointment proceedings as well as any commenced thereafter. If the proceeding is commenced after appointment, the previously appointed personal representative, after receipt of notice thereof, shall refrain from exercising any power of administration except as necessary to preserve the estate or unless the court orders otherwise.

(2) After notice to interested persons, including all persons interested in the administration of the estate as successors under the applicable assumption concerning testacy, any previously appointed personal representative, and any person having or claiming priority for appointment as personal representative, the court shall determine who is entitled to appointment under 72-3-501 through 72-3-508, make a proper appointment, and if appropriate, terminate any prior appointment found to have been improper as provided in cases of removal under 72-3-526.

**History: En. 91A-3-414 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-3-414.**

## Part 4

## Supervised Administration

**72-3-401. Supervised administration — nature and purpose.** Supervised administration is a single in rem proceeding to secure complete administration and settlement of a decedent's estate under the continuing authority of the court, which extends until entry of an order approving distribution of the estate and discharging the personal representative or other order terminating the proceeding.

**History: En. 91A-3-501 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-3-501(part).**

**72-3-402. Petition and order.** (1) A petition for supervised administration may be filed by any interested person or by a personal representative at any time or the prayer for supervised administration may be joined with a petition in a testacy or appointment proceeding. If the testacy of the decedent and the priority and qualification of any personal representative have not been adjudicated previously, the petition for supervised administration shall include the matters required of a petition in a formal testacy proceeding and the notice requirements and procedures applicable to a formal testacy proceeding apply. If not previously adjudicated, the court shall adjudicate the testacy of the decedent and questions relating to the priority and qualifications of the personal representative in any case involving a request for supervised administration, even though the request for supervised administration may be denied.

(2) After notice to interested persons, the court shall order supervised adminstration of a decedent's estate:

(a) if the decedent's will directs supervised administration, unless the court finds that circumstances bearing on the need for supervised administration have changed since the execution of the will and that there is no necessity for supervised administration;

(b) only upon a finding that it is necessary for protection of persons interested in the estate if the decedent's will directs unsupervised administration; or

(c) in other cases if the court finds that supervised administration is necessary under the circumstances.

**History: En. 91A-3-502 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-3-502.**

**72-3-403. Effect on other proceedings and previously appointed personal representative.** (1) The pendency of a proceeding for supervised administration of a decedent's estate stays action on any informal application then pending or thereafter filed.

(2) If a will has been previously probated in informal proceedings, the effect of the filing of a petition for supervised administration is as provided for formal testacy proceedings by 72-3-303 and 72-3-304.

(3) After he has received notice of the filing of a petition for supervised administration, a personal representative who has been appointed previously shall not exercise his power to distribute any estate. The filing of the petition does not affect his other powers and duties unless the court restricts the exercise of any of them pending full hearing on the petition.

**History: En. 91A-3-503 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-3-503.**

**72-3-404. Powers and duties of personal representative.** (1) A supervised personal representative is responsible to the court, as well as to the interested parties, and is subject to directions concerning the estate made by the court on its own motion or on the motion of any interested party.

(2) Except as otherwise provided in this part or as otherwise ordered by the court, a supervised personal representative has the same duties and powers as a personal representative who is not supervised.

(3) Unless restricted by the court, a supervised personal representative has, without interim orders approving exercise of a power, all powers of personal representatives under this code, but he shall not exercise his power to make any distri-

bution of the estate without prior order of the court. Any other restriction on the power of a personal representative which may be ordered by the court must be endorsed on his letters of appointment and unless so endorsed is ineffective as to persons dealing in good faith with the personal representative.

**History: En. 91A-3-501, 91A-3-504 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-3-501(part), 91A-3-504.**

**72-3-405. Interim orders.** Interim orders approving or directing partial distributions or granting other relief may be issued by the court at any time during the pendency of a supervised administration on the application of the personal representative or any interested person.

**History: En. 91A-3-505 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-3-505(part).**

**72-3-406. Closing orders.** Unless otherwise ordered by the court, supervised administration is terminated by order in accordance with time restrictions, notices, and contents of orders prescribed for proceedings under 72-3-1001 and 72-3-1002.

**History: En. 91A-3-505 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-3-505(part).**

## Part 5

## Personal Representative Appointment Priorities, Bond, and Termination

**72-3-501. Who may not be personal representative.** No person is qualified to serve as a personal representative who is:

(1) under the age of 18;

(2) a person whom the court finds unsuitable in formal proceedings.

**History: En. 91A-3-203 by Sec. 1, Ch. 365, L. 1974; amd. Sec. 1, Ch. 223, L. 1977; R.C.M. 1947, 91A-3-203(6).**

**72-3-502. Priorities for appointment.** Whether the proceedings are formal or informal, persons who are not disqualified have priority for appointment in the following order:

(1) the person with priority as determined by a probated will including a person nominated by a power conferred in a will;

(2) the surviving spouse of the decedent who is a devisee of the decedent;

(3) other devisees of the decedent;

(4) the surviving spouse of the decedent;

(5) other heirs of the decedent;

(6) public administrator;

(7) 45 days after the death of the decedent, any creditor.

**History: En. 91A-3-203 by Sec. 1, Ch. 365, L. 1974; amd. Sec. 1, Ch. 223, L. 1977; R.C.M. 1947, 91A-3-203(1).**

**72-3-503. Objection to appointment.** (1) An objection to an appointment can be made only in formal proceedings.

(2) In case of objection the priorities stated in 72-3-502 apply, except that:

(a) if the estate appears to be more than adequate to meet exemptions and costs of administration but inadequate to discharge anticipated unsecured claims, the court, on petition of creditors, may appoint any qualified person;

(b) in case of objection to appointment of a person other than one whose priority is determined by will by an heir or devisee appearing to have a substantial interest in the estate, the court may appoint a person who is acceptable to heirs and devisees whose interests in the estate appear to be worth in total more than half of the probable distributable value or, in default of this accord, any suitable person.

**History: En. 91A-3-203 by Sec. 1, Ch. 365, L. 1974; amd. Sec. 1, Ch. 223, L. 1977; R.C.M. 1947, 91A-3-203(2).**

**72-3-504. Renunciation — nomination of other — two or more persons sharing priority.** (1) A person entitled to letters under (2) through (5) of 72-3-502 may nominate a qualified person to act as personal representative.

(2) Any person entitled to letters may renounce his right to nominate or to an appointment by appropriate writing filed with the court.

(3) When two or more persons share a priority, those of them who do not renounce must concur in nominating another to act for them or in applying for appointment. If they are unable to concur in nominating another to act for them or in applying for appointment, the court may appoint any qualified person.

**History: En. 91A-3-203 by Sec. 1, Ch. 365, L. 1974; amd. Sec. 1, Ch. 223, L. 1977; R.C.M. 1947, 91A-3-203(3).**

**72-3-505. Rights of conservators relating to appointment.** Conservators of the estates of protected persons or, if there is no conservator, any guardian except a guardian ad litem of a minor or incapacitated person may exercise the same right to nominate, to object to another's appointment, or to participate in determining the preference of a majority in interest of the heirs and devisees that the protected person or ward would have if qualified for appointment.

**History: En. 91A-3-203 by Sec. 1, Ch. 365, L. 1974; amd. Sec. 1, Ch. 223, L. 1977; R.C.M. 1947, 91A-3-203(4).**

**72-3-506. Priority of domiciliary personal representative.** A personal representative appointed by a court of the decedent's domicile has priority over all other persons, except where the decedent's will nominates different persons to be personal representative in this state and in the state of domicile. The domiciliary personal representative may nominate another, who shall have the same priority as the domiciliary personal representative.

**History: En. 91A-3-203 by Sec. 1, Ch. 365, L. 1974; amd. Sec. 1, Ch. 223, L. 1977; R.C.M. 1947, 91A-3-203(7).**

**72-3-507. Appointment of one not having priority.** Appointment of one who does not have priority, including priority resulting from renunciation or nomination determined pursuant to 72-3-504, may be made only in formal proceedings. Before appointing one without priority, the court must determine that those having priority, although given notice of the proceedings, have failed to request appointment or to nominate another for appointment and that administration is necessary.

**History: En. 91A-3-203 by Sec. 1, Ch. 365, L. 1974; amd. Sec. 1, Ch. 223, L. 1977; R.C.M. 1947, 91A-3-203(5).**

**72-3-508. Application of priority provisions to appointment of successor.** Sections 72-3-501 through 72-3-507 govern priority for appointment of a successor personal representative but do not apply to the selection of a special administrator.

**History: En. 91A-3-203 by Sec. 1, Ch. 365, L. 1974; amd. Sec. 1, Ch. 223, L. 1977; R.C.M. 1947, 91A-3-203(8).**

**72-3-509 and 72-3-510 reserved.**

**72-3-511. Acceptance of appointment — consent to jurisdiction.** By accepting appointment, a personal representative submits personally to the jurisdiction of the court in any proceeding relating to the estate that may be instituted by any interested person. Notice of any proceeding shall be delivered to the personal representative or mailed to him by ordinary first-class mail at his address as listed in the application or petition for appointment or as thereafter reported to the court and to his address as then known to the petitioner.

**History: En. 91A-3-602 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-3-602.**

**72-3-512. Qualification — filing of bond and statement of acceptance.** Prior to receiving letters, a personal representative shall qualify by filing with the appointing court any required bond and a statement of acceptance of the duties of the office.

**History: En. 91A-3-601 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-3-601.**

**72-3-513. Bond — when required.** (1) No bond is required of a personal representative appointed in informal proceedings, except:

(a) upon the appointment of a special administrator;

(b) when an executor or other personal representative is appointed to administer an estate under a will containing an express requirement of bond; or

(c) when bond is required under 72-3-514.

(2) Bond may be required by court order at the time of appointment of a personal representative appointed in any formal proceeding, except that bond is not required of a personal representative appointed in formal proceedings if the will relieves the personal representative of bond unless bond has been requested by an interested party and the court is satisfied that it is desirable. Bond required by any will may be dispensed with in formal proceedings upon determination by the court that it is not necessary.

(3) No bond is required of any personal representative who, pursuant to statute, has deposited cash or collateral with an agency of this state to secure performance of his duties.

**History: En. 91A-3-603 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-3-603.**

**72-3-514. Demand for bond by interested person.** (1) Any person apparently having an interest in the estate worth in excess of $1,000 or any creditor having a claim in excess of $1,000 may make a written demand that a personal representative give bond. The demand must be filed with the clerk and a copy mailed to the personal representative, if appointment and qualification have occurred. Thereupon, bond is required, but the requirement ceases if the person demanding bond ceases to be interested in the estate or if bond is excused as provided in 72-3-513 or 72-3-515.

(2) After he has received notice and until the filing of the bond or cessation of the requirement of bond, the personal representative shall refrain from exercising any powers of his office except as necessary to preserve the estate.

(3) Failure of the personal representative to meet a requirement of bond by giving suitable bond within 30 days after receipt of notice is cause for his removal and appointment of a successor personal representative.

**History: En. 91A-3-605 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-3-605.**

**72-3-515. Bond amount — security — reduction.** (1) If bond is required and the provisions of the will or order do not specify the amount, unless stated in his application or petition, the person qualifying shall file a statement under oath with the clerk indicating his best estimate of the value of the personal estate of the decedent and of the income expected from the personal and real estate during the next year, and he shall execute and file a bond with the clerk or give other suitable security in an amount not less than the estimate.

(2) The clerk shall determine that the bond is duly executed by a corporate surety or one or more individual sureties whose performance is secured by pledge of personal property, mortgage on real property, or other adequate security.

(3) The clerk may permit the amount of the bond to be reduced by the value of assets of the estate deposited with a domestic financial institution in a manner that prevents their unauthorized disposition. On petition of the personal representative or another interested person, the court may excuse a requirement of bond, increase or reduce the amount of the bond, release sureties, or permit the substitution of another bond with the same or different sureties.

**History: En. 91A-3-604 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-3-604.**

**72-3-516. Terms of bond — liability of surety.** (1) The following requirements and provisions apply to any bond required by this part:

(a) Bonds shall name the state as obligee for the benefit of the persons interested in the estate and shall be conditioned upon the faithful discharge by the fiduciary of all duties according to law.

(b) Unless otherwise provided by the terms of the approved bond, sureties are jointly and severally liable with the personal representative and with each other. The address of sureties shall be stated in the bond.

(c) By executing an approved bond of a personal representative, the surety consents to the jurisdiction of the probate court which issued letters to the primary obligor in any proceedings pertaining to the fiduciary duties of the personal representative and naming the surety as a party. Notice of any proceeding shall be delivered to the surety or mailed to him by registered or certified mail at his address as listed with the court where the bond is filed and to his address as then known to the petitioner.

(d) On petition of a successor personal representative, any other personal representative of the same decedent, or any interested person, a proceeding in the court may be initiated against a surety for breach of the obligation of the bond of the personal representative.

(e) The bond of the personal representative is not void after the first recovery but may be proceeded against from time to time until the whole penalty is exhausted.

(2) No action or proceeding may be commenced against the surety on any matter as to which an action or proceeding against the primary obligor is barred by adjudication or limitation.

**History: En. 91A-3-606 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-3-606.**

**72-3-517 through 72-3-520 reserved.**

**72-3-521. Termination of appointment — general effect.** Termination of appointment of a personal representative occurs as indicated in 72-3-522 to 72-3-526, inclusive. Termination ends the right and power pertaining to the office of personal representative as conferred by this code or any will, except that a personal representative, at any time prior to distribution or until restrained or enjoined by court order, may perform acts necessary to protect the estate and may deliver the assets to a successor representative. Termination does not discharge a personal representative from liability for transactions or omissions occurring before termination or relieve him of the duty to preserve assets subject to his control, to account therefor, and to deliver the assets. Termination does not affect the jurisdiction of the court over the personal representative but terminates his authority to represent the estate in any pending or future proceeding.

**History: En. 91A-3-608 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-3-608.**

**72-3-522. Termination of appointment — death or disability.** (1) The death of a personal representative or the appointment of a conservator for the estate of a personal representative terminates his appointment.

(2) Until appointment and qualification of a successor or special representative to replace the deceased or protected representative, the representative of the estate of the deceased or protected personal representative, if any, has the duty to protect the estate possessed and being administered by his decedent or ward at the time his appointment terminates, has the power to perform acts necessary for protection, and shall account for and deliver the estate assets to a successor or special personal representative upon his appointment and qualification.

**History: En. 91A-3-609 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-3-609.**

**72-3-523. Termination of appointment — change of testacy status.** Except as otherwise ordered in formal proceedings, the probate of a will subsequent to the appointment of a personal representative in intestacy or under a will which is superseded by formal probate of another will or the vacation of an informal probate of a will subsequent to the appointment of the personal representative thereunder does not terminate the appointment of the personal representative although his powers may be reduced as provided in 72-3-304. Termination occurs upon appointment in informal or formal appointment proceedings of a person entitled to appointment under the later assumption concerning testacy. If no request for new appointment is made within 30 days after expiration of time for appeal from the order in formal testacy proceedings or from the informal probate changing the assumption concerning testacy, the previously appointed personal representative upon request may be appointed personal representative under the subsequently probated will or as in intestacy, as the case may be.

**History: En. 91A-3-612 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-3-612.**

**72-3-524. Termination of appointment — closing of estate.** (1) An appointment of a personal representative terminates, as provided in 72-3-1004, 1 year after the filing of a closing statement.

(2) An order closing an estate as provided in 72-3-1001, 72-3-1002, or 72-3-1003 terminates an appointment of a personal representative.

**History: En. 91A-3-610 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-3-610(1), (2).**

**72-3-525. Termination of appointment — voluntary.** A personal representative may resign his position by filing a written statement of resignation with the clerk after he has given at least 15 days' written notice to the persons known to be interested in the estate. If no one applies or petitions for appointment of a successor representative within the time indicated in the notice, the filed statement of resignation is ineffective as a termination of appointment and in any event is effective only upon the appointment and qualification of a successor representative and delivery of the assets to him.

**History: En. 91A-3-610 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-3-610(3).**

**72-3-526. Termination of appointment — removal for cause.** (1) A person interested in the estate may petition for removal of a personal representative for cause at any time. Upon filing of the petition, the court shall fix a time and place for hearing. Notice shall be given by the petitioner to the personal representative and to other persons as the court may order. Except as otherwise ordered as provided in 72-3-617, after receipt of notice of removal proceedings, the personal representative shall not act except to account, to correct maladministration, or preserve the estate. If removal is ordered, the court also shall direct by order the disposition of the assets remaining in the name of or under the control of the personal representative being removed.

(2) Cause for removal exists:

(a) when removal would be in the best interests of the estate; or

(b) if it is shown that a personal representative or the person seeking his appointment intentionally misrepresented material facts in the proceedings leading to his appointment or that the personal representative has disregarded an order of the court, has become incapable of discharging the duties of his office, or has mismanaged the estate or failed to perform any duty pertaining to the office.

(3) Unless the decedent's will directs otherwise, a personal representative appointed at the decedent's domicile, incident to securing appointment of himself or his nominee as ancillary personal representative, may obtain removal of another who was appointed personal representative in this state to administer local assets.

**History: En. 91A-3-611 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-3-611.**

**72-3-527. Successor personal representative.** (1) Parts 2 and 3 of this chapter govern proceedings for appointment of a personal representative to succeed one whose appointment has been terminated.

(2) After appointment and qualification, a successor personal representative may be substituted in all actions and proceedings to which the former personal representative was a party, and no notice, process, or claim which was given or served upon the former personal representative need be given to or served upon the successor in order to preserve any position or right the person giving the notice or filing the claim may thereby have obtained or preserved with reference to the former personal representative.

(3) Except as otherwise ordered by the court, the successor personal representative has the powers and duties in respect to the continued administration which the former personal representative would have had if his appointment had not been terminated.

**History: En. 91A-3-613 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-3-613.**

## Part 6

## Personal Representative Powers, Duties, and Compensation

**72-3-601. Time of accrual of duties and powers — power of executor prior to appointment — ratification.** (1) The duties and powers of a personal representative commence upon his appointment. The powers of a personal representative relate back in time to give acts by the person appointed which are beneficial to the estate occurring prior to appointment the same effect as those occurring thereafter.

(2) Prior to appointment, a person named executor in a will may carry out written instructions of the decedent relating to his body, funeral, and burial arrangements.

(3) A personal representative may ratify and accept acts on behalf of the estate done by others where the acts would have been proper for a personal representative.

**History: En. 91A-3-701 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-3-701.**

**72-3-602. Priority among different letters.** A person to whom general letters are issued first has exclusive authority under the letters until his appointment is terminated or modified. If, through error, general letters are afterwards issued to another, the first appointed representative may recover any property of the estate in the hands of the representative subsequently appointed, but the acts of the latter done in good faith before notice of the first letters are not void for want of validity of appointment.

**History: En. 91A-3-702 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-3-702.**

**72-3-603. Notice of appointment to heirs and devisees.** (1) Not later than 30 days after his appointment, every personal representative, except any special administrator, shall give information of his appointment to the heirs and devisees, including, if there has been no formal testacy proceeding and if the personal representative was appointed on the assumption that the decedent died intestate, the devisees in any will mentioned in the application for appointment of a personal representative. The information shall be delivered or sent by ordinary mail to each of the heirs and devisees whose address is reasonably available to the personal representative. The duty does not extend to require information to persons who have been adjudicated in a prior formal testacy proceeding to have no interest in the estate.

(2) The information shall:

(a) include the name and address of the personal representative;

(b) indicate that it is being sent to persons who have or may have some interest in the estate being administered;

(c) indicate whether bond has been filed; and

(d) describe the court where papers relating to the estate are on file.

(3) The personal representative's failure to give this information is a breach of his duty to the persons concerned but does not affect the validity of his appointment, his powers, or other duties.

(4) A personal representative may inform other persons of his appointment by delivery or ordinary first-class mail.

**History: En. 91A-3-705 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-3-705.**

**72-3-604. Standing to sue.** Except as to proceedings which do not survive the death of the decedent, a personal representative of a decedent domiciled in this state at his death has the same standing to sue and be sued in the courts of this state and the courts of any other jurisdiction as his decedent had immediately prior to death.

**History: En. 91A-3-703 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-3-703(3).**

**72-3-605. Personal representative to proceed without court order — power to invoke jurisdiction.** A personal representative shall proceed expeditiously with the settlement and distribution of a decedent's estate and, except as otherwise specified under this code or ordered in regard to a supervised personal representative, do so without adjudication, order, or direction of the court, but he may invoke the jurisdiction of the court, in proceedings authorized by this code, to resolve questions concerning the estate or its administration.

**History: En. 91A-3-704 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-3-704.**

**72-3-606. Possession and protection of estate.** (1) Except as otherwise provided by a decedent's will and subject to the provisions of chapter 12, part 7, every personal representative has a right to and shall take possession or control of the decedent's property, except that any real property or tangible personal property may be left with or surrendered to the person presumptively entitled thereto unless or until, in the judgment of the personal representative, possession of the property by him will be necessary for purposes of administration. The request by a personal representative for delivery of any property possessed by an heir or devisee is conclusive evidence, in any action against the heir or devisee for possession thereof, that the possession of the property by the personal representative is necessary for purposes of administration.

(2) The personal representative shall pay taxes on and take all steps reasonably necessary for the management, protection, and preservation of the estate in his possession. He may maintain an action to recover possession of property or to determine the title thereto.

**History: En. 91A-3-708 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-3-708.**

**72-3-607. Inventory — appraisal — copy to department of revenue.** (1) Within 3 months after his appointment, a personal representative, who is not a special administrator or a successor to another representative who has previously discharged this duty, shall prepare and file or mail an inventory, which inventory shall include listing of all property which:

(a) the decedent owned, had an interest in or control over, individually, in common, or jointly, or otherwise had at the time of his death;

(b) the decedent had possessory or dispository rights over at the time of his death or had disposed of for less than its fair market value within 3 years of his death; or

(c) was affected by the decedent's death for the purpose of inheritance or estate taxes.

(2) The inventory shall include a statement of the full and true value of the decedent's interest in every item listed in such inventory. In this connection the personal representative shall appoint one or more qualified and disinterested persons to assist him in ascertaining the fair market value as of the date of the decedent's death of all assets included in the estate. Different persons may be employed to appraise different kinds of assets included in the estate. The names and addresses of any appraiser shall be indicated on the inventory with the item or items he appraised.

(3) The personal representative shall send a copy of the inventory to interested persons who request it, or he may file the original of the inventory with the court. In any event, a copy of the inventory and statement of value shall be mailed to the department of revenue.

**History: En. 91A-3-706 by Sec. 1, Ch. 365, L. 1974; amd. Sec. 4, Ch. 516, L. 1975; R.C.M. 1947, 91A-3-706.**

**72-3-608. Inventory to department required for sale of property — exception.** Save upon an order of court obtained after notice and hearing in a supervised proceeding or formal probate, no property of the estate may be sold unless an inventory and statement of value has been delivered to the department of revenue.

**History: En. 91A-3-715.1 by Sec. 6, Ch. 516, L. 1975; R.C.M. 1947, 91A--3-715.1.**

**72-3-609. Supplementary inventory — copy to department of revenue.** If any property not included in the original inventory comes to the knowledge of a personal representative or if the personal representative learns that the value or description indicated in the original inventory for any item is erroneous or misleading, he shall make a supplementary inventory or appraisement showing the market value as of the date of the decedent's death of the new item or the revised market value or descriptions and the appraisers or other data relied upon, if any, and file it with the court if the original inventory was filed or furnish copies thereof or information thereof to persons interested in the new information and in any case shall mail a copy of it to the department of revenue.

**History: En. 91A-3-707 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-3-707.**

**72-3-610. General duties — fiduciary.** A personal representative is a fiduciary who shall observe the standards of care applicable to trustees under the laws of the state of Montana. A personal representative is under a duty to settle and distribute the estate of the decedent in accordance with the terms of any probated and effective will and this code and as expeditiously and efficiently as is consistent with the best interests of the estate. He shall use the authority conferred upon him by this code, the terms of the will, if any, and any order in proceedings to which he is party for the best interests of successors to the estate.

**History: En. 91A-3-703 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-3-703(1).**

**72-3-611. No surcharge for authorized acts generally — limitation.** (1) A personal representative shall not be surcharged for acts of administration or distribution if the conduct in question was authorized at the time. Subject to other obligations of administration and of this code, an informally probated will is authority to administer and distribute the estate according to its terms. Subject to the provisions of this code, an order of appointment of a personal representative, whether issued in informal or formal proceedings, is authority to distribute apparently intestate assets to the heirs of the decedent if, at the time of distribution, the personal representative is not aware of a pending testacy proceeding, a proceeding to vacate an order entered in an earlier testacy proceeding, a formal proceeding questioning his appointment or fitness to continue, or a supervised administration proceeding.

(2) Nothing in this section affects the duty of the personal representative to administer and distribute the estate in accordance with the rights of claimants, the surviving spouse, any minor and dependent children, and any pretermitted child of the decedent as described elsewhere in this code.

**History: En. 91A-3-703 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-3-703(2).**

**72-3-612. No individual liability — exceptions — certain claims to be brought against personal representative.** (1) Unless otherwise provided in the contract, a personal representative is not individually liable on a contract properly entered into in his fiduciary capacity in the course of administration of the estate unless he fails to reveal his representative capacity and identify the estate in the contract.

(2) A personal representative is individually liable for obligations arising from ownership or control of the estate or for torts committed in the course of administration of the estate only if he is personally at fault.

(3) Claims based on contracts entered into by a personal representative in his fiduciary capacity, on obligations arising from ownership or control of the estate, or on torts committed in the course of estate administration may be asserted against the estate by proceeding against the personal representative in his fiduciary capacity, whether or not the personal representative is individually liable therefor.

(4) Issues of liability as between the estate and the personal representative individually may be determined in a proceeding for accounting, surcharge, or indemnification or other appropriate proceeding.

**History: En. 91A-3-808 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-3-808.**

**72-3-613. Transactions authorized for personal representative.** Except as restricted by this code or otherwise provided by the will or by an order in a formal proceeding and subject to the priorities stated in 72-3-901, a personal representative, acting reasonably for the benefit of the interested persons, may properly:

(1) retain assets owned by the decedent pending distribution or liquidation, including those in which the representative is personally interested or which are otherwise improper for trust investment;

(2) receive assets from fiduciaries or other sources;

(3) perform, compromise, or refuse performance of the decedent's contracts that continue as obligations of the estate, as he may determine under the circumstances. In performing enforceable contracts by the decedent to convey or lease land, the personal representative, among other possible courses of action, may:

(a) execute and deliver a deed of conveyance for cash payment of all sums remaining due or the purchaser's note for the sum remaining due secured by a mortgage or deed of trust on the land; or

(b) deliver a deed in escrow with directions that the proceeds, when paid in accordance with the escrow agreement, be paid to the successors of the decedent, as designated in the escrow agreement;

(4) satisfy written charitable pledges of the decedent irrespective of whether the pledges constituted binding obligations of the decedent or were properly presented as claims, if in the judgment of the personal representative the decedent would have wanted the pledges completed under the circumstances;

(5) if funds are not needed to meet debts and expenses currently payable and are not immediately distributable, deposit or invest liquid assets of the estate, including moneys received from the sale of other assets, in federally insured interest-bearing accounts, readily marketable secured loan arrangements, or other prudent investments which would be reasonable for use by trustees generally;

(6) acquire or dispose of an asset, including land in this or another state, for cash or on credit, at public or private sale and manage, develop, improve, exchange, partition, change the character of, or abandon an estate asset;

(7) make ordinary or extraordinary repairs or alterations in buildings or other structures, demolish any improvements, raze existing or erect new party walls or buildings;

(8) subdivide, develop, or dedicate land to public use; make or obtain the vacation of plats and adjust boundaries; adjust differences in valuation on exchange or partition by giving or receiving considerations; or dedicate easements to public use without consideration;

(9) enter for any purpose into a lease as lessor or lessee, with or without option to purchase or renew, for a term within or extending beyond the period of administration;

(10) enter into a lease or arrangement for exploration and removal of minerals or other natural resources or enter into a pooling or unitization agreement;

(11) with the consent of the heirs or devisees or the court, abandon property when in the opinion of the personal representative it is valueless or is so encumbered or is in condition that it is of no benefit to the estate;

(12) vote stocks or other securities in person or by general or limited proxy;

(13) pay calls, assessments, and other sums chargeable or accruing against or on account of securities, unless barred by the provisions relating to claims;

(14) hold a security in the name of a nominee or in other form without disclosure of the interest of the estate, but the personal representative is liable for any act of the nominee in connection with the security so held;

(15) insure the assets of the estate against damage, loss, and liability and himself against liability as to third persons;

(16) borrow money with or without security to be repaid from the estate assets or otherwise and advance money for the protection of the estate;

(17) with the consent of the heirs or devisees or the court, effect a fair and reasonable compromise with any debtor or obligor or extend, renew, or in any manner modify the terms of any obligation owing to the estate. If the personal representative holds a mortgage, pledge, or other lien upon property of another person, he may, in lieu of foreclosure, accept a conveyance or transfer of encumbered assets from the owner thereof in satisfaction of the indebtedness secured by lien.

(18) pay taxes, assessments, compensation of the personal representative, and other expenses incident to the administration of the estate;

(19) sell or exercise stock subscription or conversion rights; consent, directly or through a committee or other agent, to the reorganization, consolidation, merger, dissolution, or liquidation of a corporation or other business enterprise;

(20) allocate items of income or expense to either estate income or principal, as permitted or provided by law;

(21) employ persons, including attorneys, auditors, investment advisors, or agents, even if they are associated with the personal representative, to advise or assist the personal representative in the performance of his administrative duties; act without independent investigation upon their recommendations; and, instead of acting personally, employ one or more agents to perform any act of administration, whether or not discretionary;

(22) prosecute or defend claims or proceedings in any jurisdiction for the protection of the estate and of the personal representative in the performance of his duties;

(23) sell, mortgage, or lease any real or personal property of the estate or any interest therein for cash, credit, or for part cash and part credit and with or without security for unpaid balances; provided, however, no personal representative shall, without prior court approval in a supervised proceeding, either directly or indirectly purchase any property of the estate he represents, nor shall he be interested in any such sale. All sales shall be fairly conducted and made for the best price obtainable.

(24) continue any unincorporated business or venture in which the decedent was engaged at the time of his death:

(a) in the same business form for a period of not more than 4 months from the date of appointment of a general personal representative if continuation is a reasonable means of preserving the value of the business, including good will;

(b) in the same business form for any additional period of time that may be approved by order of the court in a formal proceeding to which the persons interested in the estate are parties; or

(c) throughout the period of administration, if the business is incorporated by the personal representative and if none of the probable distributees of the business who are competent adults object to its incorporation and retention in the estate;

(25) incorporate any business or venture in which the decedent was engaged at the time of his death;

(26) satisfy and settle claims and distribute the estate as provided in this code.

**History: En. 91A-3-713 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-3-713.**

**72-3-614. Power to recover property which is subject of void or voidable transfer.** The property liable for the payment of unsecured debts of a decedent includes all property transferred by him by any means which is in law void or voidable as against his creditors, and subject to prior liens, the right to recover this property, so far as necessary for the payment of unsecured debts of the decedent, is exclusively in the personal representative.

**History: En. 91A-3-709 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-3-709.**

**72-3-615. Transaction involving conflict of interest — voidable — exceptions.** Any sale or encumbrance to the personal representative, his spouse, agent, or attorney or any corporation or trust in which he has a substantial beneficial interest or any transaction which is affected by a substantial conflict of interest on the part of the personal representative is voidable by any person interested in the estate except one who has consented after fair disclosure, unless:

(1) the will or a contract entered into by the decedent expressly authorized the transaction; or

(2) the transaction is approved by the court after notice to interested persons.

**History: En. 91A-3-711 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-3-711.**

**72-3-616. Improper exercise of power — breach of fiduciary duty.** (1) If any exercise of power concerning the estate is improper, the personal representative is liable to interested persons for damage or loss resulting from breach of his fiduciary duty to the same extent as a trustee of an express trust.

(2) The rights of purchasers and others dealing with a personal representative shall be determined as provided in 72-3-615 and 72-3-618.

**History: En. 91A-3-710 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-3-710.**

**72-3-617. Order restraining personal representative.** (1) On petition of any person who appears to have an interest in the estate, the court by temporary order may restrain a personal representative from performing specified acts of administration, disbursement, or distribution or exercise of any powers or discharge of any duties of his office or make any other order to secure proper performance of his duty if it appears to the court that the personal representative otherwise may take some action which would jeopardize unreasonably the interest of the applicant or of some other interested person. Persons with whom the personal representative may transact business may be made parties.

(2) The matter shall be set for hearing within 10 days unless the parties otherwise agree. Notice as the court directs shall be given to the personal representative and his attorney of record, if any, and to any other parties named defendant in the petition.

**History: En. 91A-3-607 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-3-607.**

**72-3-618. Persons dealing with personal representative — protection.** (1) A person who in good faith and without notice either assists a personal representative or deals with him for value is protected as if the personal representative properly exercised his power. The fact that a person knowingly deals with a personal representative does not alone require the person to inquire into the existence of a power or the propriety of its exercise. Except for restrictions on powers of supervised personal representatives which are endorsed on letters as provided in 72-3-404(3), no provision in any will or order of court purporting to limit the power of a personal representative is effective except as to persons with actual knowledge thereof.

(2) A person is not bound to see to the proper application of estate assets paid or delivered to a personal representative.

(3) The protection here expressed extends to instances in which some procedural irregularity or jurisdictional defect occurred in proceedings leading to the issuance of letters, including a case in which the alleged decedent is found to be alive. The protection here expressed is not by substitution for that provided by comparable provisions of the laws relating to commercial transactions and laws simplifying transfers of securities by fiduciaries, nor does it in any way limit the provisions of 72-16-432 and 72-16-433.

**History: En. 91A-3-712 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-3-712.**

**72-3-619 and 72-3-620 reserved.**

**72-3-621. Powers and duties of successor personal representative.** A successor personal representative has the same power and duty as the original personal representative to complete the administration and distribution of the estate as expeditiously as possible, but he shall not exercise any power expressly made personal to the executor named in the will.

**History: En. 91A-3-716 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-3-716.**

**72-3-622. Corepresentatives — when joint action required.** If two or more persons are appointed corepresentatives and unless the will provides otherwise, the concurrence of all is required on all acts connected with the administration and distribution of the estate. This restriction does not apply:

(1) when any corepresentative receives and receipts for property due the estate;

(2) when the concurrence of all cannot readily be obtained in the time reasonably available for emergency action necessary to preserve the estate; or

(3) when a corepresentative has been delegated to act for the others.

**History: En. 91A-3-717 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-3-717(part).**

**72-3-623. Persons dealing with single corepresentative — protection.** Persons dealing with a corepresentative, if actually unaware that another has been appointed to serve with him or if advised by the personal representative with whom they deal that he has authority to act alone for any of the reasons mentioned herein, are as fully protected as if the person with whom they dealt had been the sole personal representative.

**History: En. 91A-3-717 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-3-717(part).**

**72-3-624. Powers of remaining corepresentative.** Unless the terms of the will otherwise provide, every power exercisable by personal corepresentatives may be exercised by the one or more remaining after the appointment of one or more is terminated, and if one of two or more nominated as coexecutors is not appointed, those appointed may exercise all the powers incident to the office.

**History: En. 91A-3-718 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-3-718.**

**72-3-625 through 72-3-630 reserved.**

**72-3-631. Compensation of personal representative.** (1) A personal representative is entitled to reasonable compensation for his services. Such compensation shall not exceed 3% of the first $40,000 of the value of the estate as reported for federal estate tax or state inheritance tax purposes, whichever is larger, and 2% of the value of the estate in excess of $40,000 as reported for federal estate tax or state inheritance tax purposes, whichever is larger.

(2) In proceedings conducted for the termination of joint tenancies, the compensation of the personal representative shall not exceed 2% of the interest passing.

(3) In proceedings conducted for the termination of a life estate, the compensation allowed the personal representative shall not exceed 2% of the value of the life estate if it is terminated in connection with a probate or joint tenancy termination. If a life estate is terminated separately, the personal representative's compensation shall not exceed 2% of the value of the estate, except that it shall not be less than $100.

(4) If there is more than one personal representative, only one compensation is allowed.

(5) The court may allow additional compensation for extraordinary services. Such additional compensation shall not be greater than the amount which is allowed for the original compensation.

(6) If the will provides for the compensation of the personal representative and there is no contract with the decedent regarding compensation, the personal representative may renounce the provision before qualifying and be entitled to compensation under the terms of this section. A personal representative also may renounce his right to all or any part of the compensation. A written renunciation of fee may be filed with the court.

**History: En. 91A-3-719 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-3-719.**

**72-3-632. Expenses of personal representative in estate litigation.** If any personal representative or person nominated as personal representative defends or prosecutes any proceeding in good faith, whether successful or not, he is entitled to receive from the estate his necessary expenses and disbursements, including reasonable attorneys' fees incurred.

**History: En. 91A-3-721 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-3-721.**

**72-3-633. Compensation of attorney.** (1) If the services of an attorney are engaged by the personal representative, the compensation of such attorney shall not exceed 1 ½ times the compensation allowable to the personal representative.

(2) If the services of an attorney are engaged by the personal representative to assist in the termination of joint tenancies, the compensation allowed the attorney shall not exceed 3% of the interest passing.

(3) If the services of an attorney are engaged in connection with the termination of a life estate, the compensation allowed the attorney shall not exceed 3% of the value of the life estate if it is terminated in connection with a probate or joint tenancy termination. If a life estate is terminated separately, the attorney's compensation shall not exceed 3%, except that it shall not be less than $100.

(4) If the services of more than one attorney are engaged, only one compensation shall be allowed.

(5) In cases where further compensation may be allowed to an attorney, the same must be fixed and determined by the court upon good cause shown after notice and hearing of an application therefor.

**History: En. 91A-3-720 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-3-720.**

**72-3-634. Proceedings for review of employment of agents and compensation of personal representatives and employees.** (1) Upon the filing of a motion for settlement of fees by the court filed by an interested person, the personal representative, or the person employed by the personal representative and after notice to all interested persons, the propriety of employment of any person by a personal representative, including any attorney, auditor, investment advisor, or other specialized agent or assistant, the reasonableness of the compensation of any person so employed, or the reasonableness of the compensation determined by the personal representative for his own services shall be reviewed and determined by the court.

(2) In any dispute concerning fees, the court shall set the fee.

(3) Any person who has received excessive compensation from an estate for services rendered may be ordered to make appropriate refunds.

**History: En. 91A-3-722 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-3-722.**

## Part 7

## Special Administrator

**72-3-701. Special administrator — how and when appointed.** A special administrator may be appointed:

(1) informally by the clerk on the application of any interested person when necessary to protect the estate of a decedent prior to the appointment of a general personal representative or if a prior appointment has been terminated as provided in 72-3-522;

(2) in a formal proceeding by order of the court on the petition of any interested person and finding, after notice and hearing, that appointment is necessary to preserve the estate or to secure its proper administration, including its administration in circumstances where a general personal representative cannot or should not act. If it appears to the court that an emergency exists, appointment may be ordered without notice.

**History: En. 91A-3-614 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-3-614.**

**72-3-702. Special administrator — who may be appointed.** (1) If a special administrator is to be appointed pending the probate of a will which is the subject of a pending application or petition for probate, the person named executor in the will shall be appointed if available and qualified.

(2) In other cases, any proper person may be appointed special administrator.

**History: En. 91A-3-615 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-3-615.**

**72-3-703. Special administrator appointed informally — powers and duties.** A special administrator appointed by the clerk in informal proceedings pursuant to 72-3-701(1) has the duty to collect and manage the assets of the estate, to preserve them, to account therefor, and to deliver them to the general personal representative upon his qualification. The special administrator has the power of a personal representative under the code necessary to perform his duties.

**History: En. 91A-3-616 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-3-616.**

**72-3-704. Special administrator — formal proceedings — power and duties.** A special administrator appointed by order of the court in any formal proceeding has the power of a general personal representative, except as limited in the appointment and duties as prescribed in the order. The appointment may be for a specified time, to perform particular acts, or on other terms as the court may direct.

**History: En. 91A-3-617 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-3-617.**

**72-3-705. Special administrator — termination of appointment.** The appointment of a special administrator terminates in accordance with the provisions of the order of appointment or on the appointment of a general personal representative. In other cases, the appointment of a special administrator is subject to termination as provided in 72-3-521 through 72-3-526.

**History: En. 91A-3-618 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-3-618.**

## Part 8

## Creditors' Claims

**72-3-801. Notice to creditors.** Unless notice has already been given under this section, a personal representative upon his appointment shall publish a notice once a week for 3 successive weeks in a newspaper of general circulation in the county announcing his appointment and address and notifying creditors of the estate to present their claims within 4 months after the date of the first publication of the notice or be forever barred, and proof of publication shall be filed with the clerk.

**History: En. 91A-3-801 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-3-801.**

**72-3-802. Statutes of limitations — waiver — suspension.** Unless an estate is insolvent, the personal representative, with the consent of all successors, may waive any defense of limitations available to the estate. If the defense is not waived, no claim which was barred by any statute of limitations at the time of the decedent's death shall be allowed or paid. The running of any statute of limitations measured from some other event than death and advertisement for claims against a decedent is suspended during the 4 months following the decedent's death but resumes thereafter as to claims not barred pursuant to the sections which follow. For purposes of any statute of limitations, the proper presentation of a claim under 72-3-804 is equivalent to commencement of a proceeding on the claim.

**History: En. 91A-3-802 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-3-802.**

**72-3-803. Nonclaim — limitations on presentation of claims — exceptions.** (1) All claims against a decedent's estate with the exception of claims for taxes and claims founded on tort which arose before the death of the decedent, including claims of the state and any subdivision thereof, whether due or to become due, absolute or contingent, liquidated or unliquidated, founded on contract or other legal basis, if not barred earlier by other statute of limitations, are barred against the estate, the personal representative, and the heirs and devisees of the decedent, unless presented as follows:

(a) within 4 months after the date of the first publication of notice to creditors if notice is given in compliance with 72-3-801; provided, claims barred by the nonclaim statute at the decedent's domicile before the first publication for claims in this state are also barred in this state; or

(b) within 3 years after the decedent's death if notice to creditors has not been published.

(2) All claims against a decedent's estate with the exception of claims for taxes and claims founded on tort which arise at or after the death of the decedent, including claims of the state and any subdivision thereof, whether due or to become due, absolute or contingent, liquidated or unliquidated, founded on contract or other legal basis, are barred against the estate, the personal representative, and the heirs and devisees of the decedent, unless presented as follows:

(a) a claim based on a contract with the personal representative, within 4 months after performance by the personal representative is due;

(b) any other claim, within 4 months after it arises.

(3) Nothing in this section affects or prevents:

(a) any proceeding to enforce any mortgage, pledge, or other lien upon property of the estate; or

(b) to the limits of the insurance protection only, any proceeding to establish liability of the decedent or the personal representative for which he is protected by liability insurance.

**History: En. 91A-3-803 by Sec. 1, Ch. 365, L. 1974; amd. Sec. 1, Ch. 352, L. 1975; R.C.M. 1947, 91A-3-803.**

**72-3-804. Manner of presentation of claims.** Claims against a decedent's estate may be presented as follows:

(1) The claimant shall mail to the personal representative return receipt requested a written statement of the claim indicating its basis, the name and

address of the claimant, and the amount claimed or may file a written statement of the claim, in the form prescribed by rule, with the clerk of the court. The claim is deemed presented on the first to occur of receipt of the written statement of claim by the personal representative or the filing of the claim with the court. If a claim is not yet due, the date when it will become due shall be stated. If the claim is contingent or unliquidated, the nature of the uncertainty shall be stated. If the claim is secured, the security shall be described. Failure to describe correctly the security, the nature of any uncertainty, and the due date of a claim not yet due does not invalidate the presentation made.

(2) The claimant may commence a proceeding against the personal representative, in any court where the personal representative may be subjected to jurisdiction, to obtain payment of his claim against the estate, but the commencement of the proceeding must occur within the time limited for presenting the claim. No presentation of claim is required in regard to matters claimed in proceedings against the decedent which were pending at the time of his death.

(3) If a claim is presented under subsection (1), no proceeding thereon may be commenced more than 60 days after the personal representative has mailed a notice of disallowance, but in the case of a claim which is not presently due or which is contingent or unliquidated, the personal representative may consent to an extension of the 60-day period or to avoid injustice the court, on petition, may order an extension of the 60-day period, but in no event shall the extension run beyond the applicable statute of limitations.

**History: En. 91A-3-804 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-3-804.**

**72-3-805. Allowance and disallowance of claims — interest on allowed claims.** (1) As to claims presented in the manner described in 72-3-804 within the time limit prescribed in 72-3-803, the personal representative may mail a notice to any claimant stating that the claim has been disallowed. If, after allowing or disallowing a claim, the personal representative changes his decision concerning the claim, he shall notify the claimant. The personal representative may not change a disallowance of a claim after the time for the claimant to file a petition for allowance or to commence a proceeding on the claim has run and the claim has been barred. Every claim which is disallowed in whole or in part by the personal representative is barred so far as not allowed unless the claimant files a petition for allowance in the court or commences a proceeding against the personal representative not later than 60 days after the mailing of the notice of disallowance or partial allowance if the notice warns the claimant of the impending bar. Failure of the personal representative to mail notice to a claimant of action on his claim for 60 days after the time for original presentation of the claim has expired has the effect of a notice of disallowance.

(2) Upon the petition of the personal representative or of a claimant in a proceeding for the purpose, the court may allow in whole or in part any claim or claims presented to the personal representative or filed with the clerk of the court in due time and not barred by subsection (1) of this section. Notice in this proceeding shall be given to the claimant, the personal representative, and those other persons interested in the estate as the court may direct by order entered at the time the proceeding is commenced.

(3) A judgment in a proceeding in another court against a personal representative to enforce a claim against a decedent's estate is an allowance of the claim.

(4) Unless otherwise provided in any judgment in another court entered against the personal representative, allowed claims bear interest at the legal rate for the period commencing 60 days after the time for original presentation of the claim has

expired unless based on a contract making a provision for interest, in which case they bear interest in accordance with that provision.

**History: En. 91A-3-806 by Sec. 1, Ch. 365, L. 1974; amd. Sec. 7, Ch. 516, L. 1975; R.C.M. 1947, 91A-3-806.**

**72-3-806. Counterclaims — deduction.** (1) In allowing a claim, the personal representative may deduct any counterclaim which the estate has against the claimant. In determining a claim against an estate, a court shall reduce the amount allowed by the amount of any counterclaims and, if the counterclaims exceed the claim, render a judgment against the claimant in the amount of the excess.

(2) A counterclaim, liquidated or unliquidated, may arise from a transaction other than that upon which the claim is based. A counterclaim may give rise to relief exceeding in amount or different in kind from that sought in the claim.

**History: En. 91A-3-811 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-3-811.**

**72-3-807. Classification of claims as to priority of payment.** (1) If the applicable assets of the estate are insufficient to pay all claims in full, the personal representative shall make payment in the following order:

(a) costs and expenses of administration;

(b) reasonable funeral expenses and reasonable and necessary medical and hospital expenses of the last illness of the decedent, including compensation of persons attending him;

(c) federal estate and Montana state estate and inheritance taxes;

(d) debts with preference under federal and Montana law;

(e) other federal and Montana state taxes;

(f) all other claims.

(2) No preference shall be given in the payment of any claim over any other claim of the same class, and a claim due and payable shall not be entitled to a preference over claims not due.

**History: En. 91A-3-805 by Sec. 1, Ch. 365, L. 1974; amd. Sec. 2, Ch. 352, L. 1975; R.C.M. 1947, 91A-3-805.**

**72-3-808. Payment of claims.** (1) Upon the expiration of 4 months from the date of the first publication of the notice to creditors, the personal representative shall proceed to pay the claims allowed against the estate in the order of priority prescribed after making provision for homestead, family, and support allowances, for claims already presented which have not yet been allowed or whose allowance has been appealed, and for unbarred claims which may yet be presented, including costs and expenses of administration.

(2) By petition to the court in a proceeding for the purpose or by appropriate motion if the administration is supervised, a claimant whose claim has been allowed but not paid as provided herein may secure an order directing the personal representative to pay the claim to the extent that funds of the estate are available for the payment.

(3) The personal representative at any time may pay any just claim which has not been barred, with or without formal presentation, but he is personally liable to any other claimant whose claim is allowed and who is injured by such payment if:

(a) the payment was made before the expiration of the time limit stated in subsection (1) and the personal representative failed to require the payee to give adequate security for the refund of any of the payment necessary to pay other claimants; or

(b) the payment was made, due to the negligence or willful fault of the personal representative, in such manner as to deprive the injured claimant of his priority.

**History: En. 91A-3-807 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-3-807.**

**72-3-809 and 72-3-810 reserved.**

**72-3-811. Secured claims.** Payment of a secured claim is upon the basis of the amount allowed if the creditor surrenders his security; otherwise payment is upon the basis of one of the following:

(1) if the creditor exhausts his security before receiving payment, unless precluded by other law, upon the amount of the claim allowed less the fair value of the security; or

(2) if the creditor does not have the right to exhaust his security or has not done so, upon the amount of the claim allowed less the value of the security determined by converting it into money according to the terms of the agreement pursuant to which the security was delivered to the creditor or by the creditor and personal representative by agreement, arbitration, compromise, or litigation.

**History: En. 91A-3-809 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-3-809.**

**72-3-812. Encumbered assets.** (1) If any assets of the estate are encumbered by mortgage, pledge, lien, or other security interest, the personal representative may pay the encumbrance or any part thereof, renew or extend any obligation secured by the encumbrance, or convey or transfer the assets to the creditor in satisfaction of his lien, in whole or in part, whether or not the holder of the encumbrance has filed a claim, if it appears to be for the best interest of the estate.

(2) Payment of an encumbrance does not increase the share of the distributee entitled to the encumbered assets unless the distributee is entitled to exoneration.

**History: En. 91A-3-814 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-3-814.**

**72-3-813. Execution and levies prohibited.** No execution may issue upon nor may any levy be made against any property of the estate under any judgment against a decedent or a personal representative, but this section shall not be construed to prevent the enforcement of mortgages, pledges, or liens upon real or personal property in an appropriate proceeding.

**History: En. 91A-3-812 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-3-812.**

**72-3-814. Claims not due and contingent or unliquidated claims.** (1) If a claim which will become due at a future time or a contingent or unliquidated claim becomes due or certain before the distribution of the estate and if the claim has been allowed or established by a proceeding, it is paid in the same manner as presently due and absolute claims of the same class.

(2) In other cases the personal representative or, on petition of the personal representative or the claimant in a special proceeding for the purpose, the court may provide for payment as follows:

(a) If the claimant consents, he may be paid the present or agreed value of the claim, taking any uncertainty into account.

(b) Arrangement for future payment or possible payment on the happening of the contingency or on liquidation may be made by creating a trust, giving a mortgage, obtaining a bond or security from a distributee, or otherwise.

**History: En. 91A-3-810 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-3-810.**

**72-3-815. Compromise of claims.** When a claim against the estate has been presented in any manner, the personal representative with the consent of the heirs or devisees or the court may, if it appears for the best interest of the estate, compromise the claim, whether due or not due, absolute or contingent, liquidated or unliquidated.

**History: En. 91A-3-813 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-3-813.**

**72-3-816 through 72-3-820 reserved.**

**72-3-821. Administration in more than one state — payment of claims.** (1) All assets of estates being administered in this state are subject to all claims, allowances, and charges existing or established against the personal representative wherever appointed.

(2) If the estate either in this state or as a whole is insufficient to cover all family exemptions and allowances determined by the law of the decedent's domicile, prior charges and claims, after satisfaction of the exemptions, allowances, and charges, each claimant whose claim has been allowed either in this state or elsewhere in administrations of which the personal representative is aware is entitled to receive payment of an equal proportion of his claim. If a preference or security in regard to a claim is allowed in another jurisdiction but not in this state, the creditor so benefited is to receive dividends from local assets only upon the balance of his claim after deducting the amount of the benefit.

(3) In case the family exemptions and allowances, prior charges and claims of the entire estate exceed the total value of the portions of the estate being administered separately and this state is not the state of the decedent's last domicile, the claims allowed in this state shall be paid their proportion if local assets are adequate for the purpose, and the balance of local assets shall be transferred to the domiciliary personal representative. If local assets are not sufficient to pay all claims allowed in this state the amount to which they are entitled, local assets shall be marshalled so that each claim allowed in this state is paid its proportion as far as possible, after taking into account all dividends on claims allowed in this state from assets in other jurisdictions.

**History: En. 91A-3-815 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-3-815.**

**72-3-822. Distribution to domiciliary personal representative — exceptions.** (1) The estate of a nonresident decedent being administered by a personal representative appointed in this state shall, if there is a personal representative of the decedent's domicile willing to receive it, be distributed to the domiciliary personal representative for the benefit of the successors of the decedent unless:

(a) by virtue of the decedent's will, if any, and applicable choice of law rules, the successors are identified pursuant to the local law of this state without reference to the local law of the decedent's domicile;

(b) the personal representative of this state, after reasonable inquiry, is unaware of the existence or identity of a domiciliary personal representative; or

(c) the court orders otherwise in a proceeding for a closing order under 72-3-1001 or incident to the closing of a supervised administration.

(2) In other cases, distribution of the estate of a decedent shall be made in accordance with the other parts of this chapter.

**History: En. 91A-3-816 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-3-816.**

## Part 9

## Special Provisions Relating to Distribution

**72-3-901. Abatement.** (1) Except as provided in subsection (3) and except as provided in connection with the share of the surviving spouse who elects to take an elective share, shares of distributees abate, without any preference or priority as between real and personal property, in the following order:

(a) property not disposed of by the will;

(b) residuary devises;

(c) general devises;
(d) specific devises.

(2) For purposes of abatement, a general devise charged on any specific property or fund is a specific devise to the extent of the value of the property on which it is charged and, upon the failure or insufficiency of the property on which it is charged, a general devise to the extent of the failure or insufficiency. Abatement within each classification is in proportion to the amounts of property each of the beneficiaries would have received if full distribution of the property had been made in accordance with the terms of the will.

(3) If the will expresses an order of abatement or if the testamentary plan or the express or implied purpose of the devise would be defeated by the order of abatement stated in subsection (1), the shares of the distributees abate as may be found necessary to give effect to the intention of the testator.

(4) If the subject of a preferred devise is sold or used incident to administration, abatement shall be achieved by appropriate adjustments in or contribution from other interests in the remaining assets.

**History: En. 91A-3-902 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-3-902.**

**72-3-902. Distribution in kind preferred — method — valuation.** Unless a contrary intention is indicated by the will, the distributable assets of a decedent's estate shall be distributed in kind to the extent possible through application of the following provisions:

(1) A specific devisee is entitled to distribution of the thing devised to him, and a spouse or child who has selected particular assets of an estate as provided in 72-2-802 shall receive the items selected.

(2) Any homestead or family allowance or devise payable in money may be satisfied by value in kind, provided:

(a) the person entitled to the payment has not demanded payment in cash;

(b) the property distributed in kind is valued at fair market value as of the date of its distribution; and

(c) no residuary devisee has requested that the asset in question remain a part of the residue of the estate.

(3) For the purpose of valuation under subsection (2), securities regularly traded on recognized exchanges, if distributed in kind, are valued at the price for the last sale of like securities traded on the business day prior to distribution or, if there was no sale on that day, at the median between amounts bid and offered at the close of that day. Assets consisting of sums owed the decedent or the estate by solvent debtors as to which there is no known dispute or defense are valued at the sum due with accrued interest or discounted to the date of distribution. For assets which do not have readily ascertainable values, a valuation as of a date not more than 30 days prior to the date of distribution, if otherwise reasonable, controls. For purposes of facilitating distribution, the personal representative may ascertain the value of the assets as of the time of the proposed distribution in any reasonable way, including the employment of qualified appraisers, even if the assets may have been previously appraised.

(4) The residuary estate shall be distributed in kind if there is no objection to the proposed distribution and it is practicable to distribute undivided interests. In other cases, residuary property may be converted into cash for distribution.

**History: En. 91A-3-906 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-3-906(1).**

**72-3-903. Proposal for distribution — delivery — objection.** (1) After the probable charges against the estate are known, the personal representative may mail or deliver a proposal for distribution to all persons who have a right to object to the proposed distribution.

(2) The right of any distributee to object to the proposed distribution on the basis of the kind or value of asset he is to receive, if not waived earlier in writing, terminates if he fails to object in writing received by the personal representative within 30 days after mailing or delivery of the proposal.

**History: En. 91A-3-906 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-3-906(2).**

**72-3-904. Distribution in kind — evidence of title.** If distribution in kind is made, the personal representative shall execute an instrument or deed of distribution assigning, transferring, or releasing the assets to the distributee as evidence of the distributee's title to the property.

**History: En. 91A-3-907 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-3-907.**

**72-3-905. Distribution by personal representative conclusive evidence of succession to interest by distributee.** Proof that a distributee has received an instrument or deed of distribution of assets in kind or payment in distribution from a personal representative is conclusive evidence that the distributee has succeeded to the interest of the estate in the distributed assets, as against all persons interested in the estate, except that the personal representative may recover the assets or their value if the distribution was improper.

**History: En. 91A-3-908 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-3-908.**

**72-3-906. Improper distribution or payment — liability of distributee or payee.** Unless the distribution or payment no longer can be questioned because of adjudication, estoppel, or limitation, a distributee of property improperly distributed or paid or a claimant who was improperly paid is liable to return the property improperly received and its income since distribution if he has the property. If he does not have the property, then he is liable to return the value as of the date of disposition of the property improperly received and its income and gain received by him.

**History: En. 91A-3-909 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-3-909.**

**72-3-907. Purchases from distributees protected.** If property distributed in kind or a security interest therein is acquired by a purchaser or lender for value from a distributee who has received an instrument or deed of distribution from the personal representative, the purchaser or lender takes title free of any claims of the estate and incurs no personal liability to the estate, whether or not the distribution was proper. To be protected under this provision, a purchaser or lender need not inquire whether a personal representative acted properly in making the distribution in kind.

**History: En. 91A-3-910 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-3-910.**

**72-3-908 through 72-3-910 reserved.**

**72-3-911. Successors' rights if no administration.** (1) In the absence of administration, the heirs and devisees are entitled to the estate in accordance with the terms of a probated will or the laws of intestate succession.

(2) Devisees may establish title by the probated will to devised property. Persons entitled to property by homestead allowance, exemption, or intestacy may establish title thereto by proof of the decedent's ownership, his death, and their relationship to the decedent.

(3) Successors take subject to all charges incident to administration, including the claims of creditors and allowances of surviving spouse and dependent children

and subject to the rights of others resulting from abatement, retainer, advancement, and ademption.

**History: En. 91A-3-901 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-3-901.**

**72-3-912. Successor's indebtedness to estate offset against interest — defenses available.** The amount of a noncontingent indebtedness of a successor to the estate if due, or its present value if not due, shall be offset against the successor's interest; but the successor has the benefit of any defense which would be available to him in a direct proceeding for recovery of the debt.

**History: En. 91A-3-903 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-3-903.**

**72-3-913. Interest on general pecuniary devise.** General pecuniary devises bear interest at the legal rate beginning 1 year after the first appointment of a personal representative until payment, unless a contrary intent is indicated by the will.

**History: En. 91A-3-904 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-3-904.**

**72-3-914. Partition for purpose of distribution.** When two or more heirs or devisees are entitled to distribution of undivided interests in any real or personal property of the estate, the personal representative or one or more of the heirs or devisees may petition the court, prior to the formal or informal closing of the estate, to make partition. After notice to the interested heirs or devisees, the court shall partition the property in the same manner as provided by the law for civil actions of partition. The court may direct the personal representative to sell any property which cannot be partitioned without prejudice to the owners and which cannot conveniently be allotted to any one party.

**History: En. 91A-3-911 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-3-911.**

**72-3-915. Private agreements among successors as to distribution — testamentary trustee as successor.** (1) Subject to the rights of creditors and taxing authorities, competent successors may agree among themselves to alter the interests, shares, or amounts to which they are entitled under the will of the decedent or under the laws of intestacy in any way that they provide in a written contract executed by all who are affected by its provisions. The personal representative shall abide by the terms of the agreement subject to his obligation to administer the estate for the benefit of creditors, to pay all taxes and costs of administration, and to carry out the responsibilities of his office for the benefit of any successors of the decedent who are not parties.

(2) Personal representatives of decedents' estates are not required to see to the performance of trusts if the trustee thereof is another person who is willing to accept the trust. Accordingly, trustees of a testamentary trust are successors for the purposes of this section. Nothing herein relieves trustees of any duties owed to beneficiaries of trusts.

**History: En. 91A-3-912 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-3-912.**

**72-3-916. Distribution to trustee — registration — bond.** (1) Before distributing to a trustee, the personal representative may require that the trust be registered if the state in which it is to be administered provides for registration and that the trustee inform the beneficiaries as provided in [section 7-303 of the Uniform Probate Code as promulgated by the national conference of commissioners on uniform state laws].

(2) If the trust instrument does not excuse the trustee from giving bond, the personal representative may petition the appropriate court to require that the trustee post bond if he apprehends that distribution might jeopardize the interests of persons who are not able to protect themselves, and he may withhold distribution until the court has acted.

(3) No inference of negligence on the part of the personal representative shall be drawn from his failure to exercise the authority conferred by subsections (1) and (2).

**History: En. 91A-3-913 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-3-913.**

**72-3-917. Distribution to person under disability.** A personal representative may discharge his obligation to distribute to any person under legal disability by distributing to his conservator or any other person authorized by this code or otherwise to give a valid receipt and discharge for the distribution.

**History: En. 91A-3-915 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-3-915.**

**72-3-918. Disposition of unclaimed assets — escheat.** (1) If an heir, devisee, or claimant cannot be found, the personal representative shall distribute the share of the missing person to his conservator, if any, otherwise to the department of revenue to be deposited in the state escheat fund as provided in chapter 14, as amended.

(2) Any person having any claim to a share deposited in the state escheat fund under the provisions of this code shall follow the procedures set out in chapter 14, concerning escheated estates, to claim such share.

**History: En. 91A-3-914 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-3-914.**

## Part 10

## Closing Estates

**72-3-1001. Formal proceedings terminating administration — testate or intestate — order of complete settlement.** (1) A personal representative or any interested person may petition for an order of complete settlement of the estate. The personal representative may petition at any time, and any other interested person may petition after 1 year from the appointment of the original personal representative, except that no petition under this section may be entertained until the time for presenting claims which arose prior to the death of the decedent has expired.

(2) The petition may request the court to determine testacy, if not previously determined, to consider the final account or compel or approve an accounting and distribution, to construe any will or determine heirs, and to adjudicate the final settlement and distribution of the estate.

(3) After notice to all interested persons and hearing, the court may enter an order or orders, on appropriate conditions, determining the persons entitled to distribution of the estate and, as circumstances require, approving settlement and directing or approving distribution of the estate and discharging the personal representative from further claim or demand of any interested person.

**History: En. 91A-3-1001 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A--3-1001(1).**

**72-3-1002. Order of complete settlement as to persons previously omitted or unnotified in previous formal testacy proceeding.** If one or more heirs or devisees were omitted as parties in or were not given notice of a previous formal testacy proceeding, the court, on proper petition for an order of complete settlement of the estate under 72-3-1001 and after notice to the omitted or unnotified persons and other interested parties determined to be interested on the assumption that the previous order concerning testacy is conclusive as to those given notice of the earlier proceeding, may determine testacy as it affects the omitted persons and confirm or alter the previous order of testacy as it affects all interested persons as appropriate in the light of the new proofs. In the absence of objection by an omitted or unnotified person, evidence received in the original testacy proceeding shall constitute prima facie proof of due execution of any will previously admitted to probate or of the fact that the decedent left no valid will if the prior proceedings determined this fact.

**History: En. 91A-3-1001 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A--3-1001(2).**

**72-3-1003. Formal proceedings terminating administration under informally probated will — settlement order construing will without adjudicating testacy.** (1) A personal representative administering an estate under an informally probated will or any devisee under an informally probated will may petition for an order of settlement of the estate which will not adjudicate the testacy status of the decedent. The personal representative may petition at any time and a devisee may petition after 1 year from the appointment of the original personal representative, except that no petition under this section may be entertained until the time for presenting claims which arose prior to the death of the decedent has expired.

(2) The petition may request the court to consider the final account or compel or approve an accounting and distribution, to construe the will, and adjudicate final settlement and distribution of the estate. After notice to all devisees and the personal representative and hearing, the court may enter an order or orders, on appropriate conditions, determining the persons entitled to distribution of the estate under the will and, as circumstances require, approving settlement and directing or approving distribution of the estate and discharging the personal representative from further claim or demand of any devisee who is a party to the proceeding and those he represents. If it appears that a part of the estate is intestate, the proceedings shall be dismissed or amendments made to meet the provisions of 72-3-1001 and 72-3-1002.

**History: En. 91A-3-1002 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-3-1002.**

**72-3-1004. Closing estate by sworn statement of personal representative.** (1) Unless prohibited by order of the court and except for estates being administered in supervised administration proceedings, a personal representative may close an estate by filing with the court, no earlier than 6 months after the date of original appointment of a general personal representative for the estate, a verified statement stating that he or a prior personal representative whom he has succeeded has:

(a) published notice to creditors as provided by 72-3-801 and that the first publication occurred more than 6 months prior to the date of the statement;

(b) fully administered the estate of the decedent by making payment, settlement, or other disposition of all claims which were presented, expenses of administration, and estate, inheritance, and other death taxes, except as specified in the statement, and that the assets of the estate have been distributed to the persons entitled; if any claims remain undischarged, the statement shall state whether the personal representative has distributed the estate subject to possible liability with the agreement of the distributees, or it shall state in detail other arrangements which have been made to accommodate outstanding liabilities;

(c) sent a copy thereof to all distributees of the estate and to all creditors or other claimants of whom he is aware whose claims are neither paid nor barred and has furnished a full account in writing of his administration to the distributees whose interests are affected thereby; and

(d) complied with the provisions of 72-3-1006.

(2) If no proceedings involving the personal representative are pending in the court 1 year after the closing statement is filed, the appointment of the personal representative terminates.

**History: En. 91A-3-1003 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-3-1003.**

**72-3-1005. Final accounting required to close estate.** (1) Before an estate may be finally closed and the personal representative relieved of his duties and obligations, he shall either file with the court or deliver to all interested persons an accounting under oath showing the amount of money received and expended by him, the amount of all claims presented against the estate, and the names of the claimants and all other matters necessary to show the state of its affairs.

(2) Any interested person at any time during the course of the administration of an estate may for good cause shown require further accountings.

(3) If the personal representative is the sole beneficiary of the estate, no accounting need be made.

**History: En. 91A-3-1012 by Sec. 5, Ch. 516, L. 1975; R.C.M. 1947, 91A-3-1012.**

**72-3-1006. Certificate or receipt showing taxes paid required to close estate.** (1) In all probate proceedings under this code, before final distribution to successors is made and before any petition is granted under 72-3-1001, 72-3-1002, 72-3-1003, or 72-3-1004, there shall have been filed with the clerk a certificate from the department of revenue or a receipt from the county treasurer stating that any inheritance tax due on the assets of the estate has been paid.

(2) This section shall not prohibit such partial distribution as may become necessary in the course of administration.

**History: En. 91A-3-1004 by Sec. 1, Ch. 365, L. 1974; amd. Sec. 1, Ch. 99, L. 1975; R.C.M. 1947, 91A-3-1004.**

**72-3-1007 through 72-3-1010 reserved.**

**72-3-1011. Limitation on actions against personal representative.** Unless previously barred by adjudication and except as provided in the closing statement, the rights of successors and of creditors whose claims have not otherwise been barred against the personal representative for breach of fiduciary duty are barred unless a proceeding to assert the same is commenced within 6 months after the filing of the closing statement. The rights thus barred do not include rights to recover from a personal representative for fraud, misrepresentation, or inadequate disclosure related to the settlement of the decedent's estate.

**History: En. 91A-3-1006 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-3-1006.**

**72-3-1012. Liability of distributees to claimants.** (1) After assets of an estate have been distributed and subject to 72-3-1013, an undischarged claim not barred may be prosecuted in a proceeding against one or more distributees. No distributee shall be liable to claimants for amounts in excess of the value of his distribution as of the time of distribution.

(2) As between distributees, each shall bear the cost of satisfaction of unbarred claims as if the claim had been satisfied in the course of administration. Any dis-

tributee who shall have failed to notify other distributees of the demand made upon him by the claimant in sufficient time to permit them to join in any proceeding in which the claim was asserted against him loses his right of contribution against other distributees.

**History: En. 91A-3-1005 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-3-1005.**

**72-3-1013. Limitation on actions against distributees.** (1) Unless previously adjudicated in a formal testacy proceeding or in a proceeding settling the accounts of a personal representative or otherwise barred, the claim of any claimant to recover from a distributee who is liable to pay the claim and the right of any heir or devisee or of a successor personal representative acting in their behalf to recover property improperly distributed or the value thereof from any distributee is forever barred at the later of 3 years after the decedent's death or 1 year after the time of distribution thereof.

(2) This section does not bar an action to recover property or value received as the result of fraud.

**History: En. 91A-3-1007 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-3-1007.**

**72-3-1014. Certificate discharging liens securing fiduciary performance.** After his appointment has terminated, the personal representative, his sureties, or any successor of either, upon the filing of a verified application showing so far as is known by the applicant that no action concerning the estate is pending in any court, is entitled to receive a certificate from the clerk that the personal representative appears to have fully administered the estate in question. The certificate evidences discharge of any lien on any property given to secure the obligation of the personal representative in lieu of bond or any surety but does not preclude action against the personal representative or the surety.

**History: En. 91A-3-1008 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-3-1008.**

**72-3-1015. Estate to be closed within two years.** (1) If an estate has not been closed within 2 years from the date of appointment of the personal representative, the clerk of the district court shall notify the district judge thereof. The judge shall order the personal representative and his attorney to appear before the court and show cause why the estate has not been closed.

(2) If, after the show cause hearing, the judge determines that good cause does not exist for failure to close the estate, the judge may make an order directing that the estate be closed within 30 days and that the personal representative and his attorney receive no fee or other compensation from the estate.

**History: En. 91A-3-1011 by Sec. 1, Ch. 191, L. 1975; R.C.M. 1947, 91A-3-1011.**

**72-3-1016. Subsequent administration upon discovery of other property.** If other property of the estate is discovered after an estate has been settled and the personal representative discharged or after 1 year after a closing statement has been filed, the court upon petition of any interested person and upon notice as it directs may appoint the same or a successor personal representative to administer the subsequently discovered estate. If a new appointment is made, unless the court orders otherwise, the provisions of this code apply as appropriate; but no claim previously barred may be asserted in the subsequent administration.

**History: En. 91A-3-1009 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-3-1009.**

## Part 11

## Small Estates — Summary Procedures

**72-3-1101. Collection of property by affidavit.** (1) Thirty days after the death of a decedent, any person indebted to the decedent or having possession of tangible personal property or an instrument evidencing a debt, obligation, stock, or chose in action belonging to the decedent shall make payment of the indebtedness or deliver the tangible personal property or an instrument evidencing a debt, obligation, stock, or chose in action to a person claiming to be the successor of the decedent upon being presented an affidavit made by or on behalf of the successor stating that:

(a) the value of the entire estate, wherever located, less liens and encumbrances, does not exceed $1,500;

(b) 30 days have elapsed since the death of the decedent;

(c) no application or petition for the appointment of a personal representative is pending or has been granted in any jurisdiction; and

(d) the claiming successor is entitled to payment or delivery of the property.

(2) A transfer agent of any security shall change the registered ownership on the books of a corporation from the decedent to the successor or successors upon the presentation of an affidavit as provided in subsection (1).

**History: En. 91A-3-1201 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-3-1201.**

**72-3-1102. Effect of payment pursuant to affidavit — remedy for failure to pay.** (1) The person paying, delivering, transferring, or issuing personal property or the evidence thereof pursuant to affidavit is discharged and released to the same extent as if he dealt with a personal representative of the decedent. He is not required to see to the application of the personal property or evidence thereof or to inquire into the truth of any statement in the affidavit.

(2) If any person to whom an affidavit is delivered refuses to pay, deliver, transfer, or issue any personal property or evidence thereof, it may be recovered or its payment, delivery, transfer, or issuance compelled upon proof of their right in a proceeding brought for the purpose by or on behalf of the persons entitled thereto.

(3) Any person to whom payment, delivery, transfer, or issuance is made is answerable and accountable therefor to any person representative of the estate or to any other person having a superior right.

**History: En. 91A-3-1202 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-3-1202.**

**72-3-1103. Summary procedure for disbursement and distribution.** If it appears from the inventory and appraisal that the value of the net distributable estate does not exceed $1,500 or the value of the entire estate, less liens and encumbrances, does not exceed homestead allowance, exempt property, family allowance, costs and expenses of administration, reasonable funeral expenses, and reasonable and necessary medical and hospital expenses of the last illness of the decedent, the personal representative, without giving notice to creditors, may immediately disburse and distribute the estate to the persons entitled thereto and file a closing statement as provided in 72-3-1104.

**History: En. 91A-3-1203 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-3-1203.**

**72-3-1104. Closing by sworn statement of personal representative — termination of appointment.** (1) Unless prohibited by order of the court and except for estates being administered by supervised personal representatives, a personal representative may close an estate administered under the summary procedures of 72-3-1103 by filing with the court, at any time after disbursement and distribution of the estate, a verified statement stating that:

(a) to the best knowledge of the personal representative, the value of the net distributable estate did not exceed $1,500 or the value of the entire estate, less liens and encumbrances, did not exceed homestead allowance, exempt property, family allowance, costs and expenses of administration, reasonable funeral expenses, and reasonable, necessary medical and hospital expenses of the last illness of the decedent;

(b) the personal representative has fully administered the estate by payment of inheritance taxes and by disbursing and distributing it to the persons entitled thereto; and

(c) the personal representative has sent a copy of the closing statement to all distributees of the estate and to all creditors or other claimants of whom he is aware whose claims are neither paid nor barred and has furnished a full account in writing of his administration to the distributees whose interests are affected.

(2) If no actions or proceedings involving the personal representative are pending in the court 1 year after the closing statement is filed, the appointment of the personal representative terminates.

(3) A closing statement filed under this section has the same effect as one filed under 72-3-1004.

**History: En. 91A-3-1204 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-3-1204.**

# CHAPTER 4

# UPC — FOREIGN PERSONAL REPRESENTATIVES AND ANCILLARY ADMINISTRATION

### Part 1 — General Provisions

Section

72-4-101. Definitions.

### Part 2 — Jurisdiction Over Foreign Personal Representatives

72-4-201. Jurisdiction by act of foreign personal representative.
72-4-202. Jurisdiction by act of decedent.
72-4-203. Service on foreign personal representative.

### Part 3 — Powers and Duties of Foreign Personal Representative

72-4-301. Powers of foreign representative generally — limited powers upon limited compliance.
72-4-302. Effect of local administration on foreign representative, third persons, and local representative.
72-4-303. Filing of letters, bond, inventory, and affidavit — copy to department of revenue.
72-4-304. Determination of inheritance tax — certificate of department of revenue showing tax paid, waived, or bond posted.
72-4-305. Right to inspect estate assets for inventory.
72-4-306. Payment of debt and delivery of property to foreign representative.
72-4-307. Payment or delivery discharges debtor or possessor.
72-4-308. Payment or delivery to foreign representative prohibited by resident creditor notice — court order to allow payment or delivery.

Part 4 — Ancillary Administration

72-4-401. Ancillary administration — provisions governing.
72-4-402. Adjudication in other jurisdiction binding on local representative.

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## Part 1

## General Provisions

**72-4-101. Definitions.** In this chapter, the following definitions apply:

(1) "Local administration" means administration by a personal representative appointed in this state pursuant to appointment proceedings described in chapter 3.

(2) "Local personal representative" includes any personal representative appointed in this state pursuant to appointment proceedings described in chapter 3 and excludes foreign personal representatives who acquire the power of a local personal representative pursuant to 72-4-301.

(3) "Resident creditor" means a person domiciled in or doing business in this state who is or could be a claimant against an estate of a nonresident decedent.

**History: En. 91A-4-101 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-4-101.**

## Part 2

## Jurisdiction Over Foreign Personal Representatives

**72-4-201. Jurisdiction by act of foreign personal representative.** (1) A foreign personal representative by doing any of the acts described in part 3 or by doing any act as a personal representative in this state that would have given the state jurisdiction over him as an individual submits himself personally to the jurisdiction of the courts of this state in any proceeding relating to the estate.

(2) Jurisdiction which arises solely from receiving payment of money or taking delivery of personal property is limited to the money or value of personal property collected.

**History: En. 91A-4-301 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-4-301.**

**72-4-202. Jurisdiction by act of decedent.** In addition to jurisdiction conferred by 72-4-201, a foreign personal representative is subject to the jurisdiction of the courts of this state to the same extent that his decedent was subject to jurisdiction immediately prior to death.

**History: En. 91A-4-302 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-4-302.**

**72-4-203. Service on foreign personal representative.** (1) Service of process may be made upon the foreign personal representative by registered or certified mail addressed to his last reasonably ascertainable address requesting a return receipt signed by addressee only. Notice by ordinary first-class mail is sufficient if registered or certified mail service to the addressee is unavailable. Service may be made upon a foreign personal representative in the manner in which service could have been made under other laws of this state on either the foreign personal representative or his decedent immediately prior to death.

(2) If service is made upon a foreign personal representative as provided in subsection (1), he shall be allowed at least 30 days within which to appear or respond.

**History: En. 91A-4-303 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-4-303.**

## Part 3

## Powers and Duties of Foreign Personal Representative

**72-4-301. Powers of foreign representative generally — limited powers upon limited compliance.** (1) Except as limited by 72-4-308, a domiciliary foreign personal representative who has complied with 72-4-303 and 72-4-304 may exercise as to assets in this state all powers of a local personal representative and may maintain actions and proceedings in this state, subject to any conditions imposed upon nonresident parties generally.

(2) A domiciliary foreign personal representative who has complied with all the requirements of 72-4-303(1) except for the filing of an inventory and appraisal may, when necessary to protect the estate of the decedent and upon appointment by the clerk of court, exercise the powers of a special administrator described in chapter 3, part 7.

**History: En. 91A-4-207 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-4-207.**

**72-4-302. Effect of local administration on foreign representative, third persons, and local representative.** (1) The power of a domiciliary foreign personal representative under 72-4-301 or 72-4-306 shall be exercised only if there is no administration or application therefor pending in this state. An application or petition for local administration of the estate terminates the power of the foreign personal representative to act under 72-4-301, but the local court may allow the foreign personal representative to exercise limited powers to preserve the estate.

(2) No person who, before receiving actual notice of a pending local administration, has changed his position in reliance upon the powers of a foreign personal representative shall be prejudiced by reason of the application or petition for or grant of local administration. The local personal representative is subject to all duties and obligations which have accrued by virtue of the exercise of the powers by the foreign personal representative and may be substituted for him in any action or proceedings in this state.

**History: En. 91A-4-208 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-4-208.**

**72-4-303. Filing of letters, bond, inventory, and affidavit — copy to department of revenue.** (1) The domiciliary foreign personal representative of the estate of a nonresident decedent, who wishes to receive payment and delivery as described in 72-4-306 or to exercise the powers over assets described in 72-4-301, shall file in duplicate with a district court in this state in a county in which property belonging to the decedent is located authenticated copies of his appointment and of any official bond he has given, an inventory and appraisal of the property of the nonresident decedent located in this state, which inventory shall contain the information prescribed in 72-3-607, and an affidavit stating:

(a) the date of death of the nonresident decedent; and

(b) that no local administration or application or petition therefor is pending in this state.

(2) Upon receiving the information required by subsection (1), the clerk of court shall issue a certificate to the domiciliary foreign personal representative identify-

ing him as having registered with the district court and stating the name and date of death of the decedent.

(3) The clerk shall also immediately forward a copy of the appointment, affidavit, and inventory and appraisal required by subsection (1) to the department of revenue.

**History: En. 91A-4-201 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-4-201.**

**72-4-304. Determination of inheritance tax — certificate of department of revenue showing tax paid, waived, or bond posted.** (1) The department of revenue shall determine what inheritance tax, if any, is owing on the property of the nonresident decedent located in this state and shall send notice of the tax owing to the domiciliary foreign personal representative and to the clerk of court.

(2) Upon payment of the inheritance tax due or if no tax is owing, the department of revenue shall issue a certificate to the domiciliary foreign personal representative indicating that inheritance taxes either are not owing or have been paid and shall send a copy of the certificate to the clerk of court.

(3) The department may issue an order waiving inheritance taxes on a particular item of property under such terms and circumstances as the department shall determine.

(4) Upon the posting by the domiciliary foreign personal representative of satisfactory bond, the department may issue a certificate indicating that bond has been posted sufficient to secure any inheritance tax due on the in-state property of the nonresident decedent. This certificate may be issued at any time after the filing of the inventory with the clerk of court.

**History: En. 91A-4-202 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-4-202.**

**72-4-305. Right to inspect estate assets for inventory.** Any person holding any property of a nonresident decedent, including any instrument evidencing a debt, obligation, stock, or chose in action, shall permit the domiciliary foreign personal representative of the nonresident decedent to inspect and appraise the property for purposes of completing the inventory and appraisal called for in 72-4-303(1) upon being presented with proof of his appointment and an affidavit made by or on behalf of the representative stating:

(1) the date of death of the nonresident decedent;

(2) that no local administration or application or petition therefor is pending in this state; and

(3) that the domiciliary foreign personal representative is entitled to make such inspection and appraisal.

**History: En. 91A-4-203 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-4-203.**

**72-4-306. Payment of debt and delivery of property to foreign representative.** At any time after the expiration of 60 days from the death of a nonresident decedent, any person indebted to the estate of the nonresident decedent or having possession or control of personal property or of an instrument evidencing a debt, obligation, stock, or chose in action belonging to the estate of the nonresident decedent may pay the debt, deliver the personal property, or the instrument evidencing the debt, obligation, stock, or chose in action to the domiciliary foreign personal representative of the nonresident decedent upon being presented with a certificate from the clerk of the court for the county where the domiciliary foreign personal representative has filed his affidavit, as described in 72-4-303, and a certificate from the department of revenue, as described in 72-4-304.

**History: En. 91A-4-204 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-4-204.**

**72-4-307. Payment or delivery discharges debtor or possessor.** Payment or delivery made in good faith on the basis of the certificate of the clerk of court and the certificate of the department of revenue releases the debtor or person having possession of the personal property to the same extent as if payment or delivery had been made to a local personal representative.

**History: En. 91A-4-205 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-4-205.**

**72-4-308. Payment or delivery to foreign representative prohibited by resident creditor notice — court order to allow payment or delivery.** (1) Payment or delivery under 72-4-306 may not be made if a resident creditor of the nonresident decedent has notified the debtor of the nonresident decedent or the person having possession of the personal property belonging to the nonresident decedent that the debt should not be paid or the property delivered to the domiciliary foreign personal representative.

(2) In cases under subsection (1), the foreign personal representative must seek an order of the court in which he has filed his affidavit to obtain payment or delivery unless the notification by the resident creditor is withdrawn.

**History: En. 91A-4-206 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-4-206.**

### Part 4

### Ancillary Administration

**72-4-401. Ancillary administration — provisions governing.** In respect to a nonresident decedent, the provisions of this code govern:

(1) proceedings, if any, in a court of this state for probate of the will, appointment, removal, supervision, and discharge of the local personal representative and any other order concerning the estate; and

(2) the status, powers, duties, and liabilities of any local personal representative and the rights of claimants, purchasers, distributees, and others in regard to a local administration.

**History: En. 91A-4-209 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-4-209.**

**72-4-402. Adjudication in other jurisdiction binding on local representative.** An adjudication rendered in any jurisdiction in favor of or against any personal representative of the estate is as binding on the local personal representative as if he were a party to the adjudication.

**History: En. 91A-4-401 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-4-401.**

# CHAPTER 5

# UPC — PERSONS UNDER DISABILITY GUARDIANSHIP AND CONSERVATORSHIP

### Part 1 — General Provisions

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72-5-102. Jurisdiction of subject matter — consolidation of proceedings.
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72-5-222. Court appointment of guardian of minor — when allowed — priority of testamentary appointment.
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## Part 1

## General Provisions

**72-5-101. Definitions.** Unless otherwise apparent from the context, in this code the following definitions apply:

(1) "Incapacitated person" means any person who is impaired by reason of mental illness, mental deficiency, physical illness or disability, advanced age, chronic use of drugs, chronic intoxication, or other cause (except minority) to the extent that he lacks sufficient understanding or capacity to make or communicate responsible decisions concerning his person or which cause has so impaired the person's judgment that he is incapable of realizing and making a rational decision with respect to his need for treatment.

(2) "Protective proceeding" means a proceeding under the provisions of 72-5-409 to determine that a person cannot effectively manage or apply his estate to necessary ends, either because he lacks the ability or is otherwise inconvenienced

or because he is a minor, and to secure administration of his estate by a conservator or other appropriate relief.

(3) "Protected person" means a minor or other person for whom a conservator has been appointed or other protective order has been made.

(4) "Ward" means a person for whom a guardian has been appointed. A "minor ward" is a minor for whom a guardian has been appointed solely because of minority.

**History: En. 91A-5-101 by Sec. 1, Ch. 365, L. 1974; amd. Sec. 1, Ch. 514, L. 1977; R.C.M. 1947, 91A-5-101.**

**72-5-102. Jurisdiction of subject matter — consolidation of proceedings.** (1) The court has jurisdiction over protective proceedings and guardianship proceedings.

(2) When both guardianship and protective proceedings as to the same person are commenced or pending in the same court, the proceedings may be consolidated.

**History: En. 91A-5-102 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-5-102.**

**72-5-103. Delegation of powers by parent or guardian.** A parent or a guardian of a minor or incapacitated person, by a properly executed power of attorney, may delegate to another person, for a period not exceeding 6 months, any of his powers regarding care, custody, or property of the minor child or ward, except his power to consent to marriage or adoption of a minor ward.

**History: En. 91A-5-104 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-5-104.**

**72-5-104. Informal discharge of duty to pay or deliver property to minor.** (1) Any person under a duty to pay or deliver money or personal property to a minor may perform this duty, in amounts not exceeding $5,000 per annum, by paying or delivering the money or property to:

(a) the minor, if he has attained the age of 18 years or is married;

(b) any person having the care and custody of the minor with whom the minor resides;

(c) a guardian of the minor; or

(d) a financial institution incident to a deposit in a federally insured savings account in the sole name of the minor and giving notice of the deposit to the minor.

(2) This section does not apply if the person making payment or delivery has actual knowledge that a conservator has been appointed or proceedings for appointment of a conservator of the estate of the minor are pending.

(3) The persons, other than the minor or any financial institution under (1)(d) above, receiving money or property for a minor are obligated to apply the money to the support and education of the minor but may not pay themselves except by way of reimbursement for out-of-pocket expenses for goods and services necessary for the minor's support. Any excess sums shall be preserved for future support of the minor, and any balance not so used and any property received for the minor must be turned over to the minor when he attains majority. Persons who pay or deliver in accordance with provisions of this section are not responsible for the proper application thereof.

**History: En. 91A-5-103 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-5-103.**

## Part 2

## Guardians of Minors

**72-5-201. Status of guardian of minor — how acquired generally — letters to indicate means of appointment.** (1) A person becomes a guardian of a minor by acceptance of a testamentary appointment or upon appointment by the court.

(2) Letters of guardianship must indicate whether the guardian was appointed by will or by court order.

(3) The guardianship status continues until terminated, without regard to the location from time to time of the guardian and minor ward.

**History: En. 91A-5-201, 91A-5-208 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-5-201, 91A-5-208(part).**

**72-5-202. Consent to jurisdiction by acceptance of appointment.** (1) By accepting a testamentary or court appointment as guardian, a guardian submits personally to the jurisdiction of the court in any proceeding relating to the guardianship that may be instituted by any interested person.

(2) Notice of any proceeding shall be delivered to the guardian or mailed to him by ordinary mail at his address as listed in the court records and to his address as then known to the petitioner.

**History: En. 91A-5-208 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-5-208(part).**

**72-5-203 through 72-5-210 reserved.**

**72-5-211. Testamentary appointment of guardian of minor — when effective — priorities — notice of appointment.** (1) The parent of a minor may appoint by will a guardian of an unmarried minor. Subject to the right of the minor under 72-5-213, a testamentary appointment becomes effective upon filing the guardian's acceptance in the court in which the will is probated if before acceptance both parents are dead or the surviving parent is adjudged incapacitated. If both parents are dead, an effective appointment by the parent who died later has priority.

(2) Upon acceptance of appointment, written notice of acceptance must be given by the guardian to the minor and to the person having his care or to his nearest adult relations.

**History: En. 91A-5-202 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-5-202(part).**

**72-5-212. Recognition of appointment of guardian by foreign will.** This state recognizes a testamentary appointment effected by filing the guardian's acceptance under a will probated in another state which is the testator's domicile.

**History: En. 91A-5-202 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-5-202(part).**

**72-5-213. Objection by minor fourteen or older to testamentary appointment.** A minor of 14 or more years may prevent an appointment of his testamentary guardian from becoming effective or may cause a previously accepted appointment to terminate by filing with the court in which the will is probated a written objection to the appointment before it is accepted or within 30 days after notice of its acceptance. An objection may be withdrawn. An objection does not preclude appointment by the court in a proper proceeding of the testamentary nominee or any other suitable person.

**History: En. 91A-5-203 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-5-203.**

**72-5-214 through 72-5-220 reserved.**

**72-5-221. Venue for proceedings for court appointment of guardian of minor.** The venue for guardianship proceedings for a minor is in the place where the minor resides or is present.

**History: En. 91A-5-205 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-5-205.**

**72-5-222. Court appointment of guardian of minor — when allowed — priority of testamentary appointment.** (1) The court may appoint a guardian for an unmarried minor if all parental rights of custody have been terminated or suspended by circumstances or prior court order.

(2) A guardian appointed by will as provided in 72-5-211 and 72-5-212 whose appointment has not been prevented or nullified under 72-5-213 has priority over any guardian who may be appointed by the court, but the court may proceed with an appointment upon a finding that the testamentary guardian has failed to accept the testamentary appointment within 30 days after notice of the guardianship proceeding.

**History: En. 91A-5-204 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-5-204.**

**72-5-223. Guardian of minor by court appointment — qualifications — nominee of minor preferred.** The court may appoint as guardian any person whose appointment would be in the best interests of the minor. The court shall appoint a person nominated by the minor if the minor is 14 years of age or older unless the court finds the appointment contrary to the best interests of the minor.

**History: En. 91A-5-206 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-5-206.**

**72-5-224. Temporary guardian of minor.** If necessary, the court may appoint a temporary guardian with the status of an ordinary guardian of a minor, but the authority of a temporary guardian shall not last longer than 6 months.

**History: En. 91A-5-207 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-5-207(3).**

**72-5-225. Procedure for court appointment of guardian of minor — notice — hearing — representation by attorney.** (1) Notice of the time and place of hearing of a petition for the appointment of a guardian of a minor is to be given by the petitioner in the manner prescribed by 72-1-301 to:

(a) the minor, if he is 14 or more years of age;

(b) the person who has had the principal care and custody of the minor during the 60 days preceding the date of the petition; and

(c) any living parent of the minor.

(2) Upon hearing, if the court finds that a qualified person seeks appointment, venue is proper, the required notices have been given, the requirements of 72-5-222 have been met, and the welfare and best interests of the minor will be served by the requested appointment, it shall make the appointment. In other cases the court may dismiss the proceedings or make any other disposition of the matter that will best serve the interest of the minor.

(3) If, at any time in the proceeding, the court determines that the interests of the minor are or may be inadequately represented, it may appoint an attorney to represent the minor, giving consideration to the preference of the minor if the minor is 14 years of age or older.

**History: En. 91A-5-207 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-5-207(1), (2), (4).**

**72-5-226 through 72-5-230 reserved.**

**72-5-231. Powers and duties of guardian of minor.** A guardian of a minor has the powers and responsibilities of a parent who has not been deprived of custody of his minor and unemancipated child, except that a guardian is not legally obligated to provide from his own funds for the ward and is not liable to third persons by reason of the parental relationship for acts of the ward. In particular and without qualifying the foregoing, a guardian has the following powers and duties:

(1) He must take reasonable care of his ward's personal effects and commence protective proceedings if necessary to protect other property of the ward.

(2) He may receive money payable for the support of the ward to the ward's parent, guardian, or custodian under the terms of any statutory benefit or insurance system or any private contract, devise, trust, conservatorship, or custodianship. He also may receive money or property of the ward paid or delivered by virtue of 72-5-104. Any sums so received shall be applied to the ward's current needs for support, care, and education. He must exercise due care to conserve any excess for the ward's future needs unless a conservator has been appointed for the estate of the ward, in which case excess shall be paid over at least annually to the conservator. Sums so received by the guardian are not to be used for compensation for his services except as approved by order of court or as determined by a duly appointed conservator other than the guardian. A guardian may institute proceedings to compel the performance by any person of a duty to support the ward or to pay sums for the welfare of the ward.

(3) The guardian is empowered to facilitate the ward's education, social, or other activities and to authorize medical or other professional care, treatment, or advice. A guardian is not liable by reason of this consent for injury to the ward resulting from the negligence or acts of third persons unless it would have been illegal for a parent to have consented. A guardian may consent to the marriage or adoption of his ward.

(4) A guardian must report the condition of his ward and of the ward's estate which has been subject to his possession or control, as ordered by court on petition of any person interested in the minor's welfare or as required by court rule.

**History: En. 91A-5-209 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-5-209.**

**72-5-232. Proceedings subsequent to appointment — concurrent jurisdiction of court where ward resides — venue.** (1) The court where the ward resides has concurrent jurisdiction with the court which appointed the guardian or in which acceptance of a testamentary appointment was filed over resignation, removal, accounting, and other proceedings relating to the guardianship.

(2) If the court located where the ward resides is not the court in which acceptance of appointment is filed, the court in which proceedings subsequent to appointment are commenced shall in all appropriate cases notify the other court in this or another state and after consultation with that court determine whether to retain jurisdiction or transfer the proceedings to the other court, whichever is in the best interest of the ward. A copy of any order accepting a resignation or removing a guardian shall be sent to the court in which acceptance of appointment is filed.

**History: En. 91A-5-211 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-5-211.**

**72-5-233. Termination of appointment — how effected — certain liabilities and obligations not affected.** A guardian's authority and responsibility terminates upon the death, resignation, or removal of the guardian or upon the minor's death, adoption, marriage, or attainment of majority, but termination does not affect his liability for prior acts or his obligation to account for funds and assets of his ward. Resignation of a guardian does not terminate the guardianship until it has been approved by the court. A testamentary appointment under an informally probated will terminates if the will is later denied probate in a formal proceeding.

**History: En. 91A-5-210 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-5-210.**

**72-5-234. Procedure for resignation or removal — petition, notice, and hearing — representation by attorney.** (1) Any person interested in the welfare of a ward or the ward, if 14 or more years of age, may petition for removal of a guardian on the ground that removal would be in the best interest of the ward. A guardian may petition for permission to resign. A petition for removal or for permission to resign may but need not include a request for appointment of a successor guardian.

(2) After notice and hearing on a petition for removal or for permission to resign, the court may terminate the guardianship and make any further order that may be appropriate.

(3) If at any time in the proceeding the court determines that the interests of the ward are or may be inadequately represented, it may appoint an attorney to represent the minor, giving consideration to the preference of the minor if the minor is 14 or more years of age.

**History: En. 91A-5-212 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-5-212.**

## Part 3

## Guardians of Incapacitated Persons

**72-5-301. Consent to jurisdiction by acceptance of appointment.** (1) By accepting appointment, a guardian submits personally to the jurisdiction of the court in any proceeding relating to the guardianship that may be instituted by any interested person.

(2) Notice of any proceeding shall be delivered to the guardian or mailed to him by ordinary mail at his address as listed in the court records and to his address as then known to the petitioner.

**History: En. 91A-5-305 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-5-305.**

**72-5-302. Testamentary appointment of guardian for incapacitated person — when effective — priorities.** (1) The parent of an incapacitated person may by will appoint a guardian of the incapacitated person. A testamentary appointment by a parent becomes effective when, after having given 7 days' prior written notice of his intention to do so to the incapacitated person and to the person having his care or to his nearest adult relative, the guardian files acceptance of appointment in the court in which the will is informally or formally probated, if prior thereto both parents are dead or the surviving parent is adjudged incapacitated. If both parents are dead, an effective appointment by the parent who died later has priority unless it is terminated by the denial of probate in formal proceedings.

(2) The spouse of a married incapacitated person may by will appoint a guardian of the incapacitated person. The appointment becomes effective when, after having given 7 days' prior written notice of his intention to do so to the incapacitated person and to the person having his care or to his nearest adult relative, the guardian files acceptance of appointment in the court in which the will is informally or formally probated. An effective appointment by a spouse has priority over

an appointment by a parent unless it is terminated by the denial of probate in formal proceedings.

**History: En. 91A-5-301 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-5-301(1), (2).**

**72-5-303. Recognition of appointment of guardian by foreign will.** This state shall recognize a testamentary appointment effected by filing acceptance under a will probated at the testator's domicile in another state.

**History: En. 91A-5-301 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-5-301(3).**

**72-5-304. Objection by alleged incapacitated person to testamentary appointment.** On the filing with the court in which the will was probated of written objection to the appointment by the person for whom a testamentary appointment of guardian has been made, the appointment is terminated. An objection does not prevent appointment by the court in a proper proceeding of the testamentary nominee or any other suitable person upon an adjudication of incapacity in proceedings under this part.

**History: En. 91A-5-301 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-5-301(4).**

**72-5-305 through 72-5-310 reserved.**

**72-5-311. Venue for proceedings for court appointment of guardian.** The venue for guardianship proceedings for an incapacitated person is in the place where the incapacitated person resides or is present. If the incapacitated person is admitted to an institution pursuant to order of a court of competent jurisdiction, venue is also in the county in which that court sits.

**History: En. 91A-5-302 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-5-302.**

**72-5-312. Who may be guardian — priorities.** (1) Any competent person or a suitable institution may be appointed guardian of an incapacitated person.

(2) Persons who are not disqualified have priority for appointment as guardian in the following order:

(a) the spouse of the incapacitated person;

(b) an adult child of the incapacitated person;

(c) a parent of the incapacitated person, including a person nominated by will or other writing signed by a deceased parent;

(d) any relative of the incapacitated person with whom he has resided for more than 6 months prior to the filing of the petition;

(e) a person nominated by the person who is caring for him or paying benefits to him.

**History: En. 91A-5-311 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-5-311.**

**72-5-313. Visitor in guardianship proceedings defined.** A visitor is, with respect to guardianship proceedings, a person who is trained in law, nursing, or social work and is an officer, employee, or special appointee of the court with no personal interest in the proceedings.

**History: En. 91A-5-308 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-5-308.**

**72-5-314. Notices in guardianship proceedings.** (1) In a proceeding for the appointment or removal of a guardian of an incapacitated person other than the appointment of a temporary guardian or temporary suspension of a guardian, notice of hearing shall be given to each of the following:

(a) the ward or the person alleged to be incapacitated and his spouse, parents, and adult children;

(b) any person who is serving as his guardian, conservator, or who has his care and custody; and

(c) in case no other person is notified under (a), at least one of his closest adult relatives, if any can be found.

(2) Notice shall be served personally on the alleged incapacitated person and his spouse and parents if they can be found within the state. Notice to the spouse and parents, if they cannot be found within the state, and to all other persons except the alleged incapacitated person shall be given as provided in 72-1-301. Waiver of notice by the person alleged to be incapacitated is not effective unless he attends the hearing or his waiver of notice is confirmed in an interview with the visitor. Representation of the alleged incapacitated person by a guardian ad litem is not necessary.

**History: En. 91A-5-309 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-5-309.**

**72-5-315. Procedure for court appointment of guardian — hearing — examination — interview — procedural rights.** (1) The incapacitated person or any person interested in his welfare, including the county attorney, may petition for a finding of incapacity and appointment of a guardian.

(2) Upon the filing of a petition, the court shall set a date for hearing on the issues of incapacity. The allegedly incapacitated person may have counsel of his own choice or the court may, in the interest of justice, appoint an appropriate official or attorney to represent him in the proceeding, who shall have the powers and duties of a guardian ad litem.

(3) The person alleged to be incapacitated shall be examined by a physician appointed by the court who shall submit his report in writing to the court and be interviewed by a visitor sent by the court. The visitor also shall interview the person seeking appointment as guardian and visit the present place of abode of the person alleged to be incapacitated and the place it is proposed that he will be detained or reside if the requested appointment is made and submit his report in writing to the court.

(4) The person alleged to be incapacitated is entitled to be present at the hearing in person and to see or hear all evidence bearing upon his condition. He is entitled to be present by counsel, to present evidence, to cross-examine witnesses, including the court-appointed physician and the visitor, and to trial by jury. The issue may be determined at a closed hearing without a jury if the person alleged to be incapacitated or his counsel so requests.

**History: En. 91A-5-303 by Sec. 1, Ch. 365, L. 1974; amd. Sec. 1, Ch. 222, L. 1977; amd. Sec. 2, Ch. 514, L. 1977; R.C.M. 1947, 91A-5-303.**

**72-5-316. Findings — order of appointment.** The court may appoint a guardian as requested if it is satisfied that the person for whom a guardian is sought is incapacitated and that the appointment is necessary or desirable as a means of providing continuing care and supervision of the person of the incapacitated person. Alternatively, the court may dismiss the proceeding or enter any other appropriate order.

**History: En. 91A-5-304 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-5-304.**

**72-5-317. Temporary guardians.** (1) If an incapacitated person has no guardian and an emergency exists, the court may exercise the power of a guardian pending notice and hearing.

(2) If an appointed guardian is not effectively performing his duties and the court further finds that the welfare of the incapacitated person requires immediate

action, it may, with or without notice, appoint a temporary guardian for the incapacitated person for a specified period not to exceed 6 months.

(3) A temporary guardian is entitled to the care and custody of the ward, and the authority of any permanent guardian previously appointed by the court is suspended so long as a temporary guardian has authority. A temporary guardian may be removed at any time. A temporary guardian shall make any report the court requires. In other respects the provisions of this code concerning guardians apply to temporary guardians.

**History: En. 91A-5-310 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-5-310.**

**72-5-318 through 72-5-320 reserved.**

**72-5-321. Powers and duties of guardian of incapacitated person.** (1) A guardian of an incapacitated person has the same powers, rights, and duties respecting his ward that a parent has respecting his unemancipated minor child, except that a guardian is not liable to third persons for acts of the ward solely by reason of the parental relationship. In particular and without qualifying the foregoing, a guardian has the following powers and duties, except as modified by order of the court:

(a) To the extent that it is consistent with the terms of any order by a court of competent jurisdiction relating to detention or commitment of the ward, he is entitled to custody of the person of his ward and may establish the ward's place of abode within or without this state.

(b) If entitled to custody of his ward, he shall make provision for the care, comfort, and maintenance of his ward and whenever appropriate arrange for his training and education. Without regard to custodial rights of the ward's person, he shall take reasonable care of his ward's clothing, furniture, vehicles, and other personal effects and commence protective proceedings if other property of his ward is in need of protection.

(c) A guardian may give any consents or approvals that may be necessary to enable the ward to receive medical or other professional care, counsel, treatment, or service.

(d) If no conservator for the estate of the ward has been appointed, he may:

(i) institute proceedings to compel any person under a duty to support the ward or to pay sums for the welfare of the ward to perform his duty;

(ii) receive money and tangible property deliverable to the ward and apply the money and property for support, care, and education of the ward; but he may not use funds from his ward's estate for room and board which he, his spouse, parent, or child have furnished the ward unless a charge for the service is approved by order of the court made upon notice to at least one of the next of kin of the incompetent ward, if notice is possible. He must exercise care to conserve any excess for the ward's needs.

(e) A guardian is required to report the condition of his ward and of the estate which has been subject to his possession or control, as required by the court or court rule.

(f) If a conservator has been appointed, all of the ward's estate received by the guardian in excess of those funds expended to meet current expenses for support, care, and education of the ward must be paid to the conservator for management as provided in this code, and the guardian must account to the conservator for funds expended.

(2) Any guardian of one for whom a conservator also has been appointed shall control the custody and care of the ward and is entitled to receive reasonable sums for his services and for room and board furnished to the ward as agreed upon between him and the conservator, provided the amounts agreed upon are reason-

able under the circumstances. The guardian may request the conservator to expend the ward's estate by payment to third persons or institutions for the ward's care and maintenance.

**History: En. 91A-5-312 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-5-312.**

**72-5-322. Petition of guardian for treatment of ward.** (1) If a guardian believes his ward should receive medical treatment for a mental disorder and the ward refuses, the court may, upon petition by the guardian, grant an order for evaluation or treatment, provided that no such order shall forcibly detain the ward against his will for more than 72 hours.

(2) The ward is entitled to an appointment of counsel and a hearing along with all the other rights guaranteed seriously mentally ill persons under 53-21-114, 53-21-115, 53-21-119, and 53-21-120.

**History: En. 91A-5-314 by Sec. 3, Ch. 514, L. 1977; R.C.M. 1947, 91A-5-314.**

**72-5-323. Proceedings subsequent to appointment — concurrent jurisdiction of court where ward resides — venue.** (1) The court where the ward resides has concurrent jurisdiction with the court which appointed the guardian or in which acceptance of a testamentary appointment was filed over resignation, removal, accounting, and other proceedings relating to the guardianship.

(2) If the court located where the ward resides is not the court in which acceptance of appointment is filed, the court in which proceedings subsequent to appointment are commenced shall in all appropriate cases notify the other court, in this or another state, and after consultation with that court determine whether to retain jurisdiction or transfer the proceedings to the other court, whichever may be in the best interest of the ward. A copy of any order accepting a resignation or removing a guardian shall be sent to the court in which acceptance of appointment is filed.

**History: En. 91A-5-313 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-5-313.**

**72-5-324. Termination of appointment — how effected — certain liabilities and obligations not affected.** (1) The authority and responsibility of a guardian for an incapacitated person terminates upon the death of the guardian or ward, the determination of incapacity of the guardian, or upon removal or resignation as provided in 72-5-325. Testamentary appointment under an informally probated will terminates if the will is later denied probate in a formal proceeding.

(2) Termination does not affect his liability for prior acts nor his obligation to account for funds and assets of his ward.

**History: En. 91A-5-306 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-5-306.**

**72-5-325. Petition for removal or resignation of guardian — termination of incapacity.** (1) On petition of the ward or any person interested in his welfare, the court may remove a guardian and appoint a successor if in the best interests of the ward. On petition of the guardian, the court may accept his resignation and make any other order which may be appropriate.

(2) An order adjudicating incapacity may specify a minimum period, not exceeding 1 year, during which no petition for an adjudication that the ward is no longer incapacitated may be filed without special leave. Subject to this restriction, the ward or any person interested in his welfare may petition for an order that he is no longer incapacitated and for removal or resignation of the guardian. A request

for this order may be made by informal letter to the court or judge, and any person who knowingly interferes with transmission of this kind of request to the court or judge may be adjudged guilty of contempt of court.

(3) Before removing a guardian, accepting the resignation of a guardian, or ordering that a ward's incapacity has terminated, the court, following the same procedures to safeguard the rights of the ward as apply to a petition for appointment of a guardian, may send a visitor to the residence of the present guardian and to the place where the ward resides or is detained, to observe conditions and report in writing to the court.

**History: En. 91A-5-307 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-5-307.**

## Part 4

## Protection of Property of Minors and Persons Under Disability

**72-5-401. Original petition for appointment or protective order — who may petition.** The person to be protected, any person who is interested in his estate, affairs, or welfare, including his parent, guardian, or custodian, or any person who would be adversely affected by lack of effective management of his property and affairs may petition for the appointment of a conservator or for other appropriate protective order.

**History: En. 91A-5-404 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-5-404(1).**

**72-5-402. Contents of petition.** (1) The petition shall set forth to the extent known:

(a) the interest of the petitioner;

(b) the name, age, residence, and address of the person to be protected;

(c) the name and address of his guardian, if any;

(d) the name and address of his nearest relative known to the petitioner;

(e) a general statement of his property with an estimate of the value thereof, including any compensation, insurance, pension, or allowance to which he is entitled; and

(f) the reason why appointment of a conservator or other protective order is necessary.

(2) If the appointment of a conservator is requested, the petition also shall set forth the name and address of the person whose appointment is sought and the basis of his priority for appointment.

**History: En. 91A-5-404 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-5-404(2).**

**72-5-403. Notice — waiver.** (1) On a petition for appointment of a conservator or other protective order, the person to be protected and his spouse or, if none, his parents must be served personally with notice of the proceeding at least 14 days before the date of hearing if they can be found within the state, or if they cannot be found within the state, they must be given notice in accordance with 72-1-301. Waiver by the person to be protected is not effective unless he attends the hearing or, unless minority is the reason for the proceeding, waiver is confirmed in an interview with the visitor.

(2) Notice of a petition for appointment of a conservator or other initial protective order and of any subsequent hearing must be given to any person who has filed a request for notice under 72-5-404 and to interested persons and other per-

sons as the court may direct. Except as otherwise provided in (1), notice shall be given in accordance with 72-1-301.

**History: En. 91A-5-405 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-5-405.**

**72-5-404. Request for notice — interested person.** (1) Any interested person who desires to be notified before any order is made in a protective proceeding may file with the clerk a request for notice subsequent to payment of any fee required by statute or court rule. The clerk shall mail a copy of the demand to the conservator if one has been appointed.

(2) A request is not effective unless it contains a statement showing the interest of the person making it and his address or that of his attorney and is effective only as to matters occurring after the filing. Any governmental agency paying or planning to pay benefits to the person to be protected is an interested person in protective proceedings.

**History: En. 91A-5-406 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-5-406.**

**72-5-405. Exclusive and concurrent jurisdiction of particular court after petition and notice.** After the service of notice in a proceeding seeking the appointment of a conservator or other protective order and until termination of the proceeding, the court in which the petition is filed has:

(1) exclusive jurisdiction to determine the need for a conservator or other protective order until the proceedings are terminated;

(2) exclusive jurisdiction to determine how the estate of the protected person which is subject to the laws of this state shall be managed, expended, or distributed to or for the use of the protected person or any of his dependents;

(3) concurrent jurisdiction to determine the validity of claims against the person or estate of the protected person and his title to any property or claim.

**History: En. 91A-5-402 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-5-402.**

**72-5-406. Consent to jurisdiction by acceptance of appointment as conservator.** (1) By accepting appointment, a conservator submits personally to the jurisdiction of the court in any proceeding relating to the estate that may be instituted by any interested person.

(2) Notice of any proceeding shall be delivered to the conservator or mailed to him by registered or certified mail at his address as listed in the petition for appointment or as thereafter reported to the court and to his address as then known to the petitioner.

**History: En. 91A-5-413 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-5-413.**

**72-5-407. Venue.** Venue for proceedings under this part is:

(1) in the place in this state where the person to be protected resides, whether or not a guardian has been appointed in another place; or

(2) if the person to be protected does not reside in this state, in any place where he has property.

**History: En. 91A-5-403 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-5-403.**

**72-5-408. Procedure concerning hearing and order on original petition.** (1) Upon receipt of a petition for appointment of a conservator or other protective order because of minority, the court shall set a date for hearing on the matters alleged in the petition. If, at any time in the proceeding, the court determines that the interests of the minor are or may be inadequately represented, it may appoint an attorney to represent the minor, giving consideration to the choice of the minor if 14 years of age or older. A lawyer appointed by the court to represent a minor has the powers and duties of a guardian ad litem.

(2) Upon receipt of a petition for appointment of a conservator or other protective order for reasons other than minority, the court shall set a date for hearing. Unless the person to be protected has counsel of his own choice, the court must appoint a lawyer to represent him who then has the powers and duties of a guardian ad litem. If the alleged disability is mental illness, mental deficiency, physical illness or disability, advanced age, chronic use of drugs, or chronic intoxication, the court may direct that the person to be protected be examined by a physician designated by the court, preferably a physician who is not connected with any institution in which the person is a patient or is detained. The court may send a visitor to interview the person to be protected. The visitor may be a guardian ad litem or an officer or employee of the court.

(3) After hearing, upon finding that a basis for the appointment of a conservator or other protective order has been established, the court shall make an appointment or other appropriate protective order.

**History: En. 91A-5-407 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-5-407.**

**72-5-409. Cause for appointment of conservator or issuance of protective order.** Upon petition and after notice and hearing in accordance with the provisions of this part, the court may appoint a conservator or make other protective order for cause as follows:

(1) Appointment of a conservator or other protective order may be made in relation to the estate and affairs of a minor if the court determines that a minor owns money or property that requires management or protection which cannot otherwise be provided, has or may have business affairs which may be jeopardized or prevented by his minority, or that funds are needed for his support and education and that protection is necessary or desirable to obtain or provide funds.

(2) Appointment of a conservator or other protective order may be made in relation to the estate and affairs of a person if the court determines that:

(a) the person is unable to manage his property and affairs effectively for reasons such as mental illness, mental deficiency, physical illness or disability, advanced age, chronic use of drugs, chronic intoxication, confinement, detention by a foreign power, or disappearance; and

(b) the person has property which will be wasted or dissipated unless proper management is provided or that funds are needed for the support, care, and welfare of the person or those entitled to be supported by him and that protection is necessary or desirable to obtain or provide funds.

**History: En. 91A-5-401 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-5-401.**

**72-5-410. Who may be appointed conservator — priorities.** (1) The court may appoint an individual or a corporation with general power to serve as trustee as conservator of the estate of a protected person. The following are entitled to consideration for appointment in the order listed:

(a) a conservator, guardian of property, or other like fiduciary appointed or recognized by the appropriate court of any other jurisdiction in which the protected person resides;

(b) an individual or corporation nominated by the protected person if he is 14 or more years of age and has, in the opinion of the court, sufficient mental capacity to make an intelligent choice;

(c) the spouse of the protected person;

(d) an adult child of the protected person;

(e) a parent of the protected person or a person nominated by the will of a deceased parent;

(f) any relative of the protected person with whom he has resided for more than 6 months prior to the filing of the petition;

(g) a person nominated by the person who is caring for him or paying benefits to him.

(2) A person in priorities (a), (c), (d), (e), or (f) may nominate in writing a person to serve in his stead.

(3) With respect to persons having equal priority, the court is to select the one who is best qualified of those willing to serve. The court, for good cause, may pass over a person having priority and appoint a person having less priority or no priority.

**History: En. 91A-5-410 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-5-410.**

**72-5-411. Bond — court may require — amount.** (1) The court may require a conservator to furnish a bond conditioned upon faithful discharge of all duties of the trust according to law with sureties as it shall specify.

(2) Unless otherwise directed, the bond shall be in the amount of the aggregate capital value of the property of the estate in his control plus 1 year's estimated income minus the value of securities deposited under arrangements requiring an order of the court for their removal and the value of any land which the fiduciary, by express limitation of power, lacks power to sell or convey without court authorization.

(3) The court, in lieu of sureties on a bond, may accept other security for the performance of the bond, including a pledge of securities or a mortgage of land.

**History: En. 91A-5-411 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-5-411.**

**72-5-412. Terms and requirements of bond.** (1) The following requirements and provisions apply to any bond required under 72-5-411:

(a) Unless otherwise provided by the terms of the approved bond, sureties are jointly and severally liable with the conservator and with each other.

(b) By executing an approved bond of a conservator, the surety consents to the jurisdiction of the court which issued letters to the primary obligor in any proceeding pertaining to the fiduciary duties of the conservator and naming the surety as a party defendant. Notice of any proceeding shall be delivered to the surety or mailed to him by registered or certified mail at his address as listed with the court where the bond is filed and to his address as then known to the petitioner.

(c) On petition of a successor conservator or any interested person, a proceeding may be initiated against a surety for breach of the obligation of the bond of the conservator.

(d) The bond of the conservator is not void after the first recovery but may be proceeded against from time to time until the whole penalty is exhausted.

(2) No proceeding may be commenced against the surety on any matter as to which an action or proceeding against the primary obligor is barred by adjudication or limitation.

**History: En. 91A-5-412 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-5-412.**

**72-5-413. Petitions for orders subsequent to appointment — interested persons.** (1) Any person interested in the welfare of a person for whom a conservator has been appointed may file a petition in the appointing court for an order:

(a) requiring bond or security or additional bond or security or reducing bond;

(b) requiring an accounting for the administration of the trust;

(c) directing distribution;

(d) removing the conservator and appointing a temporary or successor conservator; or

(e) granting other appropriate relief.

(2) A conservator may petition the appointing court for instructions concerning his fiduciary responsibility.

(3) Upon notice and hearing, the court may give appropriate instructions or make any appropriate order.

(4) For purposes of this section, any person, institution, or agency which is furnishing or supplying any money for support or care of a person for whom a conservator has been appointed is a person interested in the welfare of such protected person.

**History: En. 91A-5-416 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-5-416.**

**72-5-414. Resignation or removal of conservator for cause — successor conservator.** The court may remove a conservator for good cause, upon notice and hearing, or accept the resignation of a conservator. A conservator so appointed succeeds to the title and powers of his predecessor.

**History: En. 91A-5-415 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-5-415.**

**72-5-415 through 72-5-420 reserved.**

**72-5-421. Powers of court as to property and affairs of protected persons generally.** The court has the following powers which may be exercised directly or through a conservator in respect to the estate and affairs of protected persons:

(1) While a petition for appointment of a conservator or other protective order is pending and after preliminary hearing and without notice to others, the court has power to preserve and apply the property of the person to be protected as may be required for his benefit or the benefit of his dependents.

(2) After hearing and upon determining that a basis for an appointment or other protective order exists with respect to a minor without other disability, the court has all those powers over the estate and affairs of the minor which are or might be necessary for the best interests of the minor, his family, and members of his household.

(3) After hearing and upon determining that a basis for an appointment or other protective order exists with respect to a person for reasons other than minority, the court has, for the benefit of the person and members of his household, all the powers over his estate and affairs which he could exercise if present and not under disability, except the power to make a will. These powers include but are not limited to power to:

(a) make gifts;

(b) convey or release his contingent and expectant interests in property, including marital property rights and any right of survivorship incident to joint tenancy or tenancy by the entirety;

(c) exercise or release his powers as trustee, personal representative, custodian for minors, conservator, or donee of a power of appointment;

(d) enter into contracts;

(e) create revocable or irrevocable trusts of property of the estate which may extend beyond his disability or life;

(f) exercise options of the disabled person to purchase securities or other property;

(g) exercise his rights to elect options and change beneficiaries under insurance and annuity policies and surrender the policies for their cash value;

(h) exercise his right to an elective share in the estate of his deceased spouse and renounce any interest by testate or intestate succession or by inter vivos transfer.

(4) The court may exercise or direct the exercise of its authority to exercise or release powers of appointment of which the protected person is donee, to renounce interests, to make gifts in trust or otherwise exceeding 20% of any year's income of the estate, or to change beneficiaries under insurance and annuity policies, only if satisfied, after notice and hearing, that it is in the best interests of the protected person and that he either is incapable of consenting or has consented to the proposed exercise of power.

(5) An order made pursuant to this section, determining that a basis for appointment of a conservator or other protective order exists, has no effect on the capacity of the protected person.

**History: En. 91A-5-408 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-5-408.**

**72-5-422. Power of court to authorize particular protective arrangements or transactions without appointing conservator.** (1) If it is established in a proper proceeding that a basis exists as described in 72-5-409 for affecting the property and affairs of a person, the court without appointing a conservator may authorize, direct, or ratify any transaction necessary or desirable to achieve any security, service, or care arrangement meeting the foreseeable needs of the protected person. Protective arrangements include but are not limited to:

(a) payment, delivery, deposit, or retention of funds or property;

(b) sale, mortgage, lease, or other transfer of property;

(c) entry into an annuity contract, a contract for life care, a deposit contract, a contract for training and education; or

(d) addition to or establishment of a suitable trust.

(2) When it has been established in a proper proceeding that a basis exists as described in 72-5-409 for affecting the property and affairs of a person, the court without appointing a conservator may authorize, direct, or ratify any contract, trust, or other transaction relating to the protected person's financial affairs or involving his estate if the court determines that the transaction is in the best interests of the protected person.

(3) Before approving a protective arrangement or other transaction under this section, the court shall consider the interests of creditors and dependents of the protected person and, in view of his disability, whether the protected person needs the continuing protection of a conservator. The court may appoint a special conservator to assist in the accomplishment of any protective arrangement or other transaction authorized under this section who shall have the authority conferred by the order and serve until discharged by order after report to the court of all matters done pursuant to the order of appointment.

**History: En. 91A-5-409 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-5-409.**

**72-5-423. Fiduciary duty of conservator.** In the exercise of his powers, a conservator is to act as a fiduciary and shall observe the standards of care applicable to trustees.

**History: En. 91A-5-417 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-5-417.**

**72-5-424. Inventory and records.** (1) Within 90 days after his appointment, every conservator shall prepare and file with the appointing court a complete inventory of the estate of the protected person, together with his oath or affirmation that it is complete and accurate so far as he is informed. The conservator shall provide a copy thereof to the protected person if he can be located, has attained the age of 14 years, and has sufficient mental capacity to understand these matters and to any parent or guardian with whom the protected person resides.

(2) The conservator shall keep suitable records of his administration and exhibit the same on request of any interested person.

**History: En. 91A-5-418 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-5-418.**

**72-5-425. Title by appointment as conservator — appointment not transfer for certain purposes.** (1) The appointment of a conservator vests in his title as trustee to all property of the protected person presently held or thereafter acquired, including title to any property theretofore held for the protected person by custodians or attorneys-in-fact.

(2) The appointment of a conservator is not a transfer or alienation within the meaning of general provisions of any federal or state statute or regulation, insurance policy, pension plan, contract, will, or trust instrument imposing restrictions upon or penalties for transfer or alienation by the protected person of his rights or interest, but this section does not restrict the ability of persons to make specific provision by contract or dispositive instrument relating to a conservator.

**History: En. 91A-5-420 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-5-420.**

**72-5-426. Letters as evidence of transfer of assets — recording.** (1) Letters of conservatorship are evidence of transfer of all assets of a protected person to the conservator. An order terminating a conservatorship is evidence of transfer of all assets of the estate from the conservator to the protected person or his successors.

(2) Subject to the requirements of general statutes governing the filing or recordation of documents of title to land or other property, letters of conservatorship and orders terminating conservatorships may be filed or recorded to give record notice of title as between the conservator and the protected person.

**History: En. 91A-5-421 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-5-421.**

**72-5-427. Powers of conservator in administration.** (1) A conservator has all of the powers conferred herein and any additional powers conferred by law on trustees in this state. In addition, a conservator of the estate of an unmarried minor under the age of 18 years, as to whom no one has parental rights, has the duties and powers of a guardian of a minor described in 72-5-231 until the minor attains the age of 18 or marries, but the parental rights so conferred on a conservator do not preclude appointment of a guardian as provided by part 2.

(2) A conservator has power, without court authorization or confirmation, to invest and reinvest funds of the estate as would a trustee.

(3) A conservator, acting reasonably in efforts to accomplish the purpose for which he was appointed, may act without court authorization or confirmation to:

(a) collect, hold, and retain assets of the estate, including land in another state, until in his judgment disposition of the assets should be made, and the assets may be retained even though they include an asset in which he is personally interested;

(b) receive additions to the estate;

(c) continue or participate in the operation of any business or other enterprise;

(d) acquire an undivided interest in an estate asset in which the conservator in any fiduciary capacity holds an undivided interest;

(e) invest and reinvest estate assets in accordance with subsection (2);

(f) deposit estate funds in a bank including a bank operated by the conservator;

(g) acquire or dispose of an estate asset, including land in another state, for cash or on credit at public or private sale; and manage, develop, improve, exchange, partition, change the character of, or abandon an estate asset;

(h) make ordinary or extraordinary repairs or alterations in buildings or other structures, demolish any improvements, raze existing or erect new party walls or buildings;

(i) subdivide, develop, or dedicate land to public use; make or obtain the vacation of plats and adjust boundaries; adjust differences in valuation on exchange or partition by giving or receiving considerations; and dedicate easements to public use without consideration;

(j) enter for any purpose into a lease as lessor or lessee, with or without option to purchase or renew, for a term within or extending beyond the term of the conservatorship;

(k) enter into a lease or arrangement for exploration and removal of minerals or other natural resources or enter into a pooling or unitization agreement;

(l) grant an option involving disposition of an estate asset; take an option for the acquisition of any asset;

(m) vote a security in person or by general or limited proxy;

(n) pay calls, assessments, and any other sums chargeable or accruing against or on account of securities;

(o) sell or exercise stock subscription or conversion rights; consent, directly or through a committee or other agent, to the reorganization, consolidation, merger, dissolution, or liquidation of a corporation or other business enterprise;

(p) hold a security in the name of a nominee or in other form without disclosure of the conservatorship so that title to the security may pass by delivery, but the conservator is liable for any act of the nominee in connection with the stock so held;

(q) insure the assets of the estate against damage or loss and the conservator against liability with respect to third persons;

(r) borrow money to be repaid from estate assets or otherwise; advance money for the protection of the estate or the protected person and for all expenses, losses, and liability sustained in the administration of the estate or because of the holding or ownership of any estate assets, and the conservator has a lien on the estate as against the protected person for advances so made;

(s) pay or contest any claim; settle a claim by or against the estate or the protected person by compromise, arbitration, or otherwise; and release, in whole or in part, any claim belonging to the estate to the extent that the claim is uncollectible;

(t) pay taxes, assessments, compensation of the conservator, and other expenses incurred in the collection, care, administration, and protection of the estate;

(u) allocate items of income or expense to either estate income or principal, as provided by law, including creation of reserves out of income for depreciation, obsolescence, or amortization or for depletion in mineral or timber properties;

(v) pay any sum distributable to a protected person or a dependent of the person who is a minor or incompetent, without liability to the conservator, by paying the sum to the distributee or by paying the sum for the use of the distributee either to his guardian or, if none, to a relative or other person with custody of his person;

(w) employ persons, including attorneys, auditors, investment advisors, or agents, even though they are associated with the conservator, to advise or assist him in the performance of his administrative duties; act upon their recommendation without independent investigation; and instead of acting personally, employ one or more agents to perform any act of administration, whether or not discretionary;

(x) prosecute or defend actions, claims, or proceedings in any jurisdiction for the protection of estate assets and of the conservator in the performance of his duties; and

(y) execute and deliver all instruments which will accomplish or facilitate the exercise of the powers vested in the conservator.

**History: En. 91A-5-424 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-5-424.**

**72-5-428. Distributive powers and duties of conservator generally.** (1) A conservator may expend or distribute income or principal of the estate without court authorization or confirmation for the support, education, care, or benefit of the protected person and his dependents in accordance with the following principles:

(a) The conservator is to consider recommendations relating to the appropriate standard of support, education, and benefit for the protected person made by a parent or guardian, if any. He may not be surcharged for sums paid to persons or organizations actually furnishing support, education, or care to the protected person pursuant to the recommendations of a parent or guardian of the protected person unless he knows that the parent or guardian is deriving personal financial benefit therefrom, including relief from any personal duty of support, or unless the recommendations are clearly not in the best interests of the protected person.

(b) The conservator is to expend or distribute sums reasonably necessary for the support, education, care, or benefit of the protected person with due regard to:

(i) the size of the estate, the probable duration of the conservatorship, and the likelihood that the protected person, at some future time, may be fully able to manage his affairs and the estate which has been conserved for him;

(ii) the accustomed standard of living of the protected person and members of his household;

(iii) other funds or sources used for the support of the protected person.

(c) The conservator may expend funds of the estate for the support of persons legally dependent on the protected person and others who are members of the protected person's household who are unable to support themselves and who are in need of support.

(d) Funds expended under this subsection may be paid by the conservator to any person, including the protected person, to reimburse for expenditures which the conservator might have made or in advance for services to be rendered to the protected person when it is reasonable to expect that they will be performed and where advance payments are customary or reasonably necessary under the circumstances.

(2) If the estate is ample to provide for the purposes implicit in the distributions authorized by the preceding subsections, a conservator for a protected person other than a minor has power to make gifts to charity and other objects as the protected person might have been expected to make in amounts which do not exceed in total for any year 20% of the income from the estate.

**History: En. 91A-5-425 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-5-425(1), (2).**

**72-5-429. Distribution upon attainment of majority, termination of disability, or death of protected person.** (1) When a minor who has not been adjudged disabled under 72-5-409(2) attains his majority, his conservator, after meeting all prior claims and expenses of administration, shall pay over and distribute all funds and properties to the former protected person as soon as possible.

(2) When the conservator is satisfied that a protected person's disability (other than minority) has ceased, the conservator, after meeting all prior claims and expenses of administration, shall pay over and distribute all funds and properties to the former protected person as soon as possible.

(3) If a protected person dies, the conservator shall deliver to the court for safekeeping any will of the deceased protected person which may have come into his possession, inform the executor or a beneficiary named therein that he has done so, and retain the estate for delivery to a duly appointed personal representative of the decedent or other persons entitled thereto. If after 40 days from the death of the protected person no other person has been appointed personal representative

and no application or petition for appointment is before the court, the conservator may apply to exercise the powers and duties of a personal representative so that he may proceed to administer and distribute the decedent's estate without additional or further appointment. Upon application for an order granting the powers of a personal representative to a conservator, after notice to any person demanding notice under 72-3-106 and to any person nominated executor in any will of which the applicant is aware, the court may order the conferral of the power upon determining that there is no objection and endorse the letters of the conservator to note that the formerly protected person is deceased and that the conservator has acquired all of the powers and duties of a personal representative. The making and entry of an order under this section shall have the effect of an order of appointment of a personal representative as provided in 72-3-222, 72-3-223(1), and parts 5 through 10 of chapter 3, except that estate in the name of the conservator, after administration, may be distributed to the decedent's successors without prior retransfer to the conservator as personal representative.

**History: En. 91A-5-425 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-5-425(3) thru (5).**

**72-5-430. Enlargement or limitation of powers of conservator by court.** (1) Subject to the restrictions in 72-5-421(4), the court may confer on a conservator at the time of appointment or later, in addition to the powers conferred on him by 72-5-427, 72-5-428, and 72-5-429, any power which the court itself could exercise under subsections (2) and (3) of 72-5-421.

(2) The court may, at the time of appointment or later, limit the powers of a conservator conferred by the court and may at any time relieve him of any limitation. If the court limits any power conferred on the conservator by 72-5-427, 72-5-428, or 72-5-429, the limitation shall be endorsed upon his letters of appointment.

**History: En. 91A-5-426 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-5-426.**

**72-5-431. Preservation of estate plan — right to inspect will.** In investing the estate and in selecting assets of the estate for distribution under 72-5-428, in utilizing powers of revocation or withdrawal available for the support of the protected person and exercisable by the conservator or the court, the conservator and the court should take into account any known estate plan of the protected person, including his will, any revocable trust of which he is settlor, and any contract, transfer, or joint ownership arrangement with provisions for payment or transfer of benefits or interests at his death to another or others which he may have originated. The conservator may examine the will of the protected person.

**History: En. 91A-5-427 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-5-427.**

**72-5-432. Compensation and expenses.** If not otherwise compensated for services rendered, any visitor, lawyer, physician, conservator, or special conservator appointed in a protective proceeding is entitled to reasonable compensation from the estate.

**History: En. 91A-5-414 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-5-414.**

**72-5-433. Claims against protected person — presentment, allowance, and payment — priorities.** (1) A conservator must pay from the estate all just claims against the estate and against the protected person arising before or after the conservatorship upon their presentation and allowance. A claim may be presented by either of the following methods:

(a) The claimant may deliver or mail to the conservator a written statement of the claim indicating its basis, the name and address of the claimant, and the amount claimed.

(b) The claimant may file a written statement of the claim, in the form prescribed by rule, with the clerk of the court and deliver or mail a copy of the statement to the conservator.

(2) A presented claim is allowed if it is not disallowed by written statement mailed by the conservator to the claimant within 60 days after its presentation. A claim is deemed presented on the first to occur of receipt of the written statement of claim by the conservator or the filing of the claim with the court. The presentation of a claim tolls any statute of limitation relating to the claim until 30 days after its disallowance.

(3) A claimant whose claim has not been paid may petition the court for determination of his claim at any time before it is barred by the applicable statute of limitation and, upon due proof, procure an order for its allowance and payment from the estate. If a proceeding is pending against a protected person at the time of appointment of a conservator or is initiated against the protected person thereafter, the moving party must give notice of the proceeding to the conservator if the outcome is to constitute a claim against the estate.

(4) If it appears that the estate in conservatorship is likely to be exhausted before all existing claims are paid, preference is to be given to prior claims for the care, maintenance, and education of the protected person or his dependents and existing claims for expenses of administration.

**History: En. 91A-5-428 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-5-428.**

**72-5-434. Transaction involving conflict of interest — voidable — exceptions.** Any sale or encumbrance to a conservator, his spouse, agent or attorney, or any corporation or trust in which he has a substantial beneficial interest or any transaction which is affected by a substantial conflict of interest is voidable unless the transaction is approved by the court after notice to interested persons and others as directed by the court.

**History: En. 91A-5-422 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-5-422.**

**72-5-435. Persons dealing with conservator — protection.** (1) A person who in good faith either assists a conservator or deals with him for value in any transaction other than those requiring a court order as provided in 72-5-421 is protected as if the conservator properly exercised the power. The fact that a person knowingly deals with a conservator does not alone require the person to inquire into the existence of a power or the propriety of its exercise, except that restrictions on powers of conservators which are endorsed on letters as provided in 72-5-430 are effective as to third persons. A person is not bound to see to the proper application of estate assets paid or delivered to a conservator.

(2) The protection here expressed extends to instances in which some procedural irregularity or jurisdictional defect occurred in proceedings leading to the issuance of letters.

(3) The protection here expressed is not by substitution for that provided by comparable provisions of the laws relating to commercial transactions and laws simplifying transfers of securities by fiduciaries.

**History: En. 91A-5-423 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-5-423.**

**72-5-436. Claims arising during conservatorship — individual liability of conservator.** (1) Unless otherwise provided in the contract, a conservator is not individually liable on a contract properly entered into in his fiduciary capacity in the course of administration of the estate unless he fails to reveal his representative capacity and identify the estate in the contract.

(2) The conservator is individually liable for obligations arising from ownership or control of property of the estate or for torts committed in the course of administration of the estate only if he is personally at fault.

(3) Claims based on contracts entered into by a conservator in his fiduciary capacity on obligations arising from ownership or control of the estate or on torts committed in the course of administration of the estate may be asserted against the estate by proceeding against the conservator in his fiduciary capacity, whether or not the conservator is individually liable therefor.

(4) Any question of liability between the estate and the conservator individually may be determined in a proceeding for accounting, surcharge, or indemnification or other appropriate proceeding or action.

**History: En. 91A-5-429 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-5-429.**

**72-5-437. Termination of conservatorship.** The protected person, his personal representative, the conservator, or any other interested person may petition the court to terminate the conservatorship. A protected person seeking termination is entitled to the same rights and procedures as in an original proceeding for a protective order. The court, upon determining after notice and hearing that the minority or disability of the protected person has ceased, may terminate the conservatorship. Upon termination, title to assets of the estate passes to the former protected person or to his successors, subject to provision in the order for expenses of administration or to conveyances from the conservator to the former protected persons or his successors to evidence the transfer.

**History: En. 91A-5-430 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-5-430.**

**72-5-438. Accounts — final and intermediate.** (1) Every conservator must account to the court for his administration of the trust upon his resignation or removal and at other times as the court may direct. On termination of the protected person's minority or disability, a conservator may account to the court or he may account to the former protected person or his personal representative.

(2) Subject to appeal or vacation within the time permitted, an order made upon notice and hearing allowing an intermediate account of a conservator adjudicates as to his liabilities concerning the matters considered in connection therewith; and an order made upon notice and hearing allowing a final account adjudicates as to all previously unsettled liabilities of the conservator to the protected person or his successors relating to the conservatorship.

(3) In connection with any account, the court may require a conservator to submit to a physical check of the estate in his control, to be made in any manner the court may specify.

**History: En. 91A-5-419 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-5-419.**

**72-5-439. Payment of debt and delivery of property to foreign conservator without local proceedings.** (1) Any person indebted to a protected person or having possession of property or of an instrument evidencing a debt, stock, or chose in action belonging to a protected person may pay or deliver to a conservator, guardian of the estate, or other like fiduciary appointed by a court of the state or residence of the protected person upon being presented with proof of his appointment and an affidavit made by him or on his behalf stating:

(a) that no protective proceeding relating to the protected person is pending in this state; and

(b) that the foreign conservator is entitled to payment or to receive delivery.

(2) If the person to whom the affidavit is presented is not aware of any protective proceeding pending in this state, payment or delivery in response to the demand and affidavit discharges the debtor or possessor.

**History: En. 91A-5-431 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-5-431.**

## Part 5

## Powers of Attorney

**72-5-501. When power of attorney not affected by disability.** (1) Whenever a principal designates another his attorney-in-fact or agent by a power of attorney in writing and the writing contains the words, "This power of attorney shall not be affected by disability of the principal" or "This power of attorney shall become effective upon the disability of the principal" or similar words showing the intent of the principal that the authority conferred shall be exercisable notwithstanding his disability, the authority of the attorney-in-fact or agent is exercisable by him as provided in the power on behalf of the principal notwithstanding later disability or incapacity of the principal at law or later uncertainty as to whether the principal is dead or alive. All acts done by the attorney-in-fact or agent pursuant to the power during any period of disability or incompetence or uncertainty as to whether the principal is dead or alive have the same effect and inure to the benefit of and bind the principal or his heirs, devisees, and personal representative as if the principal were alive, competent, and not disabled.

(2) If a conservator thereafter is appointed for the principal, the attorney-in-fact or agent, during the continuance of the appointment, shall account to the conservator rather than the principal. The conservator has the same power the principal would have had if he were not disabled or incompetent to revoke, suspend, or terminate all or any part of the power of attorney or agency.

**History: En. 91A-5-501 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-5-501.**

**72-5-502. Other powers of attorney not revoked until knowledge of death or disability.** (1) The death, disability, or incompetence of any principal who has executed a power of attorney in writing other than a power as described by 72-5-501 does not revoke or terminate the agency as to the attorney-in-fact, agent, or other person who, without actual knowledge of the death, disability, or incompetence of the principal, acts in good faith under the power of attorney or agency. Any action so taken, unless otherwise invalid or unenforceable, binds the principal and his heirs, devisees, and personal representatives.

(2) An affidavit executed by the attorney-in-fact or agent stating that he did not have, at the time of doing an act pursuant to the power of attorney, actual knowledge of the revocation or termination of the power of attorney by death, disability, or incompetence is, in the absence of fraud, conclusive proof of the nonrevocation or nontermination of the power at that time. If the exercise of the power requires execution and delivery of any instrument which is recordable, the affidavit when authenticated for record is likewise recordable.

(3) This section shall not be construed to alter or affect any provision for revocation or termination contained in the power of attorney.

**History: En. 91A-5-502 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-5-502.**

# CHAPTERS 6 THROUGH 9

## RESERVED

# CHAPTER 10

## SUPPLEMENTARY GENERAL PROVISIONS ON PROBATE AND SUCCESSION

### Part 1 — Jurisdiction and Courts

Section

72-10-101. No requirement for orders and judgments to recite jurisdictional facts.
72-10-102. Orders to be entered in minutes.
72-10-103. Orders affecting title to real property to be recorded.
72-10-104. Service on guardian equivalent to service on ward interested in estate.
72-10-105. Disqualification of judges.
72-10-106. Duty of disqualified judge to request substitute — duty of substitute.
72-10-107. Proceeding in chambers — jury trial.
72-10-108. Citations — contents.
72-10-109. Citation — how issued.
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72-10-111. Costs — discretion of court in ordering payment.
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### Part 2 — Notice Generally

72-10-201. Personal notice given by citation.
72-10-202. Recorded order to impart notice from date of filing.
72-10-203. One publication of description of real estate sufficient.
72-10-204. Manner of publication.

## Part 1

## Jurisdiction and Courts

**72-10-101. No requirement for orders and judgments to recite jurisdictional facts.** Orders and judgments made by the court or judge in probate proceedings need not recite the existence of facts or the performance of acts upon which the jurisdiction of the court or judge may depend, but it shall only be necessary that they contain the matters ordered, except as otherwise provided in chapters 10 through 16.

**History: En. Sec. 314, p. 322, L. 1877; re-en. Sec. 314, 2nd Div. Rev. Stat. 1879; re-en. Sec. 314, 2nd Div. Comp. Stat. 1887; amd. Sec. 2910, C. Civ. Proc. 1895; re-en. Sec. 7701, Rev. C. 1907; re-en. Sec. 10355, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1704; re-en. Sec. 10355, R.C.M. 1935; R.C.M. 1947, 91-4301(part).**

**72-10-102. Orders to be entered in minutes.** All orders of the court or judge must be entered at length in the minute book of the court kept for probate proceedings.

**History: En. Sec. 314, p. 322, L. 1877; re-en. Sec. 314, 2nd Div. Rev. Stat. 1879; re-en. Sec. 314, 2nd Div. Comp. Stat. 1887; amd. Sec. 2910, C. Civ. Proc.**

**1895; re-en. Sec. 7701, Rev. C. 1907; re-en. Sec. 10355, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1704; re-en. Sec. 10355, R.C.M. 1935; R.C.M. 1947, 91-4301(part).**

**72-10-103. Orders affecting title to real property to be recorded.** When an order is made setting apart a homestead, confirming a sale, making distribution of real property, or determining any other matter affecting the title to real property, a certified copy of the same must be recorded in the office of the county clerk of the county in which the property is situated.

**History: En. Sec. 330, p. 325, L. 1877; re-en. Sec. 330, 2nd Div. Rev. Stat. 1879; re-en. Sec. 330, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2926, C. Civ. Proc. 1895; re-en. Sec. 7717, Rev. C. 1907; re-en. Sec. 10371, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1719; re-en. Sec. 10371, R.C.M. 1935; R.C.M. 1947, 91-4317.**

**72-10-104. Service on guardian equivalent to service on ward interested in estate.** Whenever an infant, insane, or incompetent person has a guardian of his estate residing in this state, personal service upon the guardian of any process, notice, or order of the court or judge concerning the estate of a deceased person in which the ward is interested is equivalent to service upon the ward, and it is the duty of the guardian to attend to the interests of the ward in the matter. Such guardian may also appear for his ward and waive any process, notice, or order to show cause which an adult or a person of sound mind might do.

**History: En. Sec. 332, p. 326, L. 1877; re-en. Sec. 332, 2nd Div. Rev. Stat. 1879; re-en. Sec. 332, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2929, C. Civ. Proc. 1895; re-en. Sec. 7720, Rev. C. 1907; re-en. Sec. 10374, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1722; re-en. Sec. 10374, R.C.M. 1935; R.C.M. 1947, 91-4320.**

**72-10-105. Disqualification of judges.** (1) No will shall be admitted to probate or letters testamentary or of administration granted before any judge who is interested as next of kin to the decedent or as legatee or devisee under the will or when he is named as executor or trustee in the will or is a witness thereto.

(2) Any judge who shall have acted as attorney for the decedent in the preparation or drawing of the will or as the attorney of the executor or administrator of the estate of any deceased person in the administration of the estate of such deceased person or as the attorney of any legatee or devisee under the will or heir of the decedent or of any person or persons claiming to be such legatee, devisee, or heir shall, from and after March 5, 1897, be disqualified from making any order or rendering any judgment or decree or doing anything whatsoever in the matter of the estate of such deceased person.

**History: En. Sec. 109, p. 264, L. 1877; re-en. Sec. 109, 2nd Div. Rev. Stat. 1879; re-en. Sec. 109, 2nd Div. Comp. Stat. 1887; amd. Sec. 2530, C. Civ. Proc. 1895; en. Sec. 1, p. 244, L. 1897; re-en. Sec. 7484, Rev. C. 1907; re-en. Sec. 10120, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1430; re-en. Sec. 10120, R.C.M. 1935; R.C.M. 1947, 91-2001(part).**

**72-10-106. Duty of disqualified judge to request substitute — duty of substitute.** (1) Whenever it shall be made to appear of record that any judge presiding in any court in which proceedings in probate matters have been or are about to be instituted is disqualified from acting therein, it shall be the duty of such judge to, as soon thereafter as practicable, request the nearest district judge to preside in the place of the judge so disqualified in such proceedings.

(2) It shall be the duty of the judge so requested, if he be not himself disqualified, from time to time as occasion may require, to preside in the place of the disqualified judge in all proceedings in such probate matters.

**History: En. Sec. 109, p. 264, L. 1877; re-en. Sec. 109, 2nd Div. Rev. Stat. 1879; re-en. Sec. 109, 2nd Div. Comp. Stat. 1887; amd. Sec. 2530, C. Civ. Proc.**

**1895; en. Sec. 1, p. 244, L. 1897; re-en. Sec. 7484, Rev. C. 1907; re-en. Sec. 10120, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1430; re-en. Sec. 10120, R.C.M. 1935; R.C.M. 1947, 91-2001(part).**

**72-10-107. Proceeding in chambers — jury trial.** (1) All orders mentioned in chapters 10 through 16 and all proceedings in matters of probate may be made or heard either before the court or the judge thereof in chambers.

(2) When a jury is needed, the court or judge may order the trial to take place in court as provided in Title 25.

**History: En. Sec. 317, p. 322, L. 1877; re-en. Sec. 317, 2nd Div. Rev. Stat. 1879; re-en. Sec. 317, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2913, C. Civ. Proc. 1895; re-en. Sec. 7704, Rev. C. 1907; re-en. Sec. 10358, R.C.M. 1921; re-en. Sec. 10358, R.C.M. 1935; R.C.M. 1947, 91-4304.**

**72-10-108. Citations — contents.** Citations must be directed to the person to be cited, signed by the clerk, and issued under the seal of the court and must contain:

(1) the title of the proceeding;
(2) the style of the citation, which shall be "The State of Montana";
(3) a brief statement of the nature of the proceeding;
(4) a direction that the person cited do appear at a time and place specified.

**History: En. Sec. 318, p. 322, L. 1877; re-en. Sec. 318, 2nd Div. Rev. Stat. 1879; re-en. Sec. 318, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2914, C. Civ. Proc. 1895; re-en. Sec. 7705, Rev. C. 1907; amd. Sec. 1, Ch. 40, L. 1921; re-en. Sec. 10359, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1707; re-en. Sec. 10359, R.C.M. 1935; R.C.M. 1947, 91-4305.**

**72-10-109. Citation — how issued.** The citation may be issued by the clerk upon the application of any party without an order of the judge, except in cases in which such order is by the provisions of chapters 10 through 16 expressly required.

**History: En. Sec. 319, p. 323, L. 1877; re-en. Sec. 319, 2nd Div. Rev. Stat. 1879; re-en. Sec. 319, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2915, C. Civ. Proc. 1895; re-en. Sec. 7706, Rev. C. 1907; re-en. Sec. 10360, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1708; re-en. Sec. 10360, R.C.M. 1935; R.C.M. 1947, 91-4306.**

**72-10-110. Citation — how and when served.** (1) The citation must be served in the same manner as a summons in a civil action.

(2) When no other time is specifically prescribed in chapters 10 through 16, citations must be served at least 5 days before the return day thereof.

**History: (1)En. Sec. 320, p. 323, L. 1877; re-en. Sec. 320, 2nd Div. Rev. Stat. 1879; re-en. Sec. 320, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2916, C. Civ. Proc. 1895; re-en. Sec. 7707, Rev. C. 1907; re-en. Sec. 10361, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1709; re-en. Sec. 10361, R.C.M. 1935; Sec. 91-4307, R.C.M. 1947; (2)En. Sec. 322, p. 323, L. 1877; re-en. Sec. 322, 2nd Div. Rev. Stat. 1879; re-en. Sec. 322, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2918, C. Civ. Proc. 1895; re-en. Sec. 7709, Rev. C. 1907; re-en. Sec. 10363, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1711; re-en. Sec. 10363, R.C.M. 1935; Sec. 91-4309, R.C.M. 1947; R.C.M. 1947, 91-4307, 91-4309.**

**72-10-111. Costs — discretion of court in ordering payment.** When it is not otherwise prescribed in chapters 10 through 16, the district court or supreme court on appeal may, in its discretion, order costs to be paid by any party to the proceedings or out of the assets of the estate, as justice may require. Execution for costs may issue out of the district court.

**History: En. Sec. 331, p. 326, L. 1877; re-en. Sec. 331, 2nd Div. Rev. Stat. 1879; re-en. Sec. 331, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2927, C. Civ. Proc. 1895; re-en. Sec. 7718, Rev. C. 1907; re-en. Sec. 10372, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1720; re-en. Sec. 10372, R.C.M. 1935; R.C.M. 1947, 91-4318.**

**72-10-112. Removal of executor, administrator, or guardian for contempt.** Whenever an executor or administrator or guardian is committed for contempt in disobeying any lawful order of the court or judge and has remained in custody for 30 days without obeying such order or purging himself otherwise of the contempt, the court or judge may, by order reciting the facts and without further showing or notice, revoke his letters and appoint some other person entitled thereto executor or administrator or guardian in his stead.

**History: En. Sec. 332, p. 326, L. 1877; re-en. Sec. 332, 2nd Div. Rev. Stat. 1879; re-en. Sec. 332, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2928, C. Civ. Proc. 1895; re-en. Sec. 7719, Rev. C. 1907; re-en. Sec. 10373, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1721; re-en. Sec. 10372, R.C.M. 1935; R.C.M. 1947, 91-4319.**

**72-10-113. Time for appeal.** The appeal must be taken within 60 days after the order or judgment is entered.

**History: En. Sec. 326, p. 324, L. 1877; re-en. Sec. 326, 2nd Div. Rev. Stat. 1879; re-en. Sec. 326, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2922, C. Civ. Proc. 1895; re-en. Sec. 7713, Rev. C. 1907; re-en. Sec. 10367, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1715; re-en. Sec. 10367, R.C.M. 1935; R.C.M. 1947, 91-4313.**

## Part 2

## Notice Generally

**72-10-201. Personal notice given by citation.** When personal notice is required and no mode of giving it is prescribed, it must be given by citation.

**History: En. Sec. 321, p. 323, L. 1877; re-en. Sec. 321, 2nd Div. Rev. Stat. 1879; re-en. Sec. 321, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2917, C. Civ. Proc. 1895; re-en. Sec. 7708, Rev. C. 1907; re-en. Sec. 10362, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1710; re-en. Sec. 10362, R.C.M. 1935; R.C.M. 1947, 91-4308.**

**72-10-202. Recorded order to impart notice from date of filing.** When it is provided in chapters 10 through 16 that any order of the court or judge or a copy thereof must be recorded in the office of the county clerk, from the time of filing the same for record notice is imparted to all persons of the contents thereof.

**History: En. Sec. 316, p. 322, L. 1877; re-en. Sec. 316, 2nd Div. Rev. Stat. 1879; re-en. Sec. 316, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2912, C. Civ. Proc. 1895; re-en. Sec. 7703, Rev. C. 1907; re-en. Sec. 10357, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1706; re-en. Sec. 10357, R.C.M. 1935; R.C.M. 1947, 91-4303.**

**72-10-203. One publication of description of real estate sufficient.** When a complete description of the real property of an estate sought to be sold has been given and published in a newspaper as required in the order to show cause why the sale should not be made, such description need not be published in any subsequent notice of sale or notice of petition for the confirmation thereof. It is sufficient to refer to the description contained in the publication of the first notice as being proved and on file in the court.

**History: En. Sec. 323, p. 324, L. 1877; re-en. Sec. 323, 2nd Div. Rev. Stat. 1879; re-en. Sec. 323, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2919, C. Civ. Proc. 1895; re-en. Sec. 7710, Rev. C. 1907; re-en. Sec. 10364, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1712; re-en. Sec. 10364, R.C.M. 1935; R.C.M. 1947, 91-4310.**

**72-10-204. Manner of publication.** When any publication is ordered in any probate or guardianship proceeding, the provisions of 25-3-502 and 25-3-503 shall, unless otherwise expressly provided by statute or by the order of the court, govern the manner of making such publication.

**History: En. Sec. 315, p. 322, L. 1877; re-en. Sec. 315, 2nd Div. Rev. Stat. 1879; re-en. Sec. 315, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2911, C. Civ. Proc. 1895; re-en. Sec. 7702, Rev. C. 1907; re-en. Sec. 10356, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1705; re-en. Sec. 10356, R.C.M. 1935; amd. Sec. 1, Ch. 7, L. 1947; R.C.M. 1947, 91-4302.**

# CHAPTER 11

# INTESTATE SUCCESSION AND WILLS SUPPLEMENTARY PROVISIONS

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72-11-104. Degrees of kindred — computation of degrees in direct line.
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72-11-333. Devise of land to include entire interest of testator.
72-11-334. Restrictions on devise to charity.

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## Part 1

## Intestate Succession

**72-11-101. Degrees of kindred — how computed.** The degree of kindred is established by the number of generations, and each generation is called a degree.

**History: En. Secs. 536-557, pp. 366-370, L. 1877; re-en. Secs. 536-557, 2nd Div. Rev. Stat. 1879; re-en. Secs. 536-557, 2nd Div. Comp. Stat. 1887; en. Sec. 1855, Civ. C. 1895; re-en. Sec. 4823, Rev. C. 1907; re-en. Sec. 7076, R.C.M. 1921; Cal. Civ. C. Sec. 1389; re-en. Sec. 7076, R.C.M. 1935; R.C.M. 1947, 91-406.**

**72-11-102. Degrees of kindred — lineal and collateral consanguinity.** The series of degrees forms the line; the series of degrees between persons who descend from one another is called direct or lineal consanguinity; and the series of degrees between persons who do not descend from one another but spring from a common ancestor is called the collateral line or collateral consanguinity.

**History: En. Secs. 536-557, pp. 366-370, L. 1877; re-en. Secs. 536-557, 2nd Div. Rev. Stat. 1879; re-en. Secs. 536-557, 2nd Div. Comp. Stat. 1887; en. Sec. 1856, Civ. C. 1895; re-en. Sec. 4824, Rev. C. 1907; re-en. Sec. 7077, R.C.M. 1921; Cal. Civ. C. Sec. 1390; re-en. Sec. 7077, R.C.M. 1935; R.C.M. 1947, 91-407.**

**72-11-103. Degrees of kindred — ascending and descending direct line.** The direct line is divided into a direct line descending and a direct line ascending. The first is that which connects the ancestors with those who descend from him. The second is that which connects a person with those from whom he descends.

**History: En. Secs. 536-557, pp. 366-370, L. 1877; re-en. Secs. 536-557, 2nd Div. Rev. Stat. 1879; re-en. Secs. 536-557, 2nd Div. Comp. Stat. 1887; en. Sec. 1857, Civ. C. 1895; re-en. Sec. 4825, Rev. C. 1907; re-en. Sec. 7078, R.C.M. 1921; Cal. Civ. C. Sec. 1391; re-en. Sec. 7078, R.C.M. 1935; R.C.M. 1947, 91-408.**

**72-11-104. Degrees of kindred — computation of degrees in direct line.** In the direct line there are as many degrees as there are generations. Thus, the son is with regard to the father in the first degree; the grandson in the second; and vice versa with regard to the father and grandfather toward the sons and grandsons.

**History: En. Secs. 536-557, pp. 366-370, L. 1877; re-en. Secs. 536-557, 2nd Div. Rev. Stat. 1879; re-en. Secs. 536-557, 2nd Div. Comp. Stat. 1887; en. Sec.**

**1858, Civ. C. 1895; re-en. Sec. 4826, Rev. C. 1907; re-en. Sec. 7079, R.C.M. 1921; Cal. Civ. C. Sec. 1392; re-en. Sec. 7079, R.C.M. 1935; R.C.M. 1947, 91-409.**

**72-11-105. Degrees of kindred — computation of degrees in collateral line.** In the collateral line, the degrees are counted by generations from one of the relations up to the common ancestor and from the common ancestor to the other relations. In such computation the decedent is excluded, the relative included, and the ancestor counted but once. Thus, brothers are related in the second degree, uncle and nephew in the third degree, cousins-german in the fourth, and so on.

**History: En. Secs. 536-557, pp. 366-370, L. 1877; re-en. Secs. 536-557, 2nd Div. Rev. Stat. 1879; re-en. Secs. 536-557, 2nd Div. Comp. Stat. 1887; en. Sec. 1859, Civ. C. 1895; re-en. Sec. 4827, Rev. C. 1907; re-en. Sec. 7080, R.C.M. 1921; Cal. Civ. C. Sec. 1393; re-en. Sec. 7080, R.C.M. 1935; re-en. Sec. 7080, R.C.M. 1935; R.C.M. 1947, 91-410.**

## Part 2

## Wills — Execution and Revocation

**72-11-201. Joint or mutual will.** A conjoint or mutual will is valid, but it may be revoked by any of the testators in like manner with any other will.

**History: En. Sec. 441, p. 349, L. 1877; re-en. Sec. 441, 2nd Div. Rev. Stat. 1879; re-en. Sec. 441, 2nd Div. Comp. Stat. 1887; re-en. Sec. 1726, Civ. C. 1895; re-en. Sec. 4729, Rev. C. 1907; re-en. Sec. 6983, R.C.M. 1921; Cal. Civ. C. Sec. 1279; Field Civ. C. Sec. 548; re-en. Sec. 6983, R.C.M. 1935; R.C.M. 1947, 91-110.**

**72-11-202. Will of conditional validity.** A will, the validity of which is made by its own terms conditional, may be denied probate, according to the event, with reference to the condition.

**History: En. Sec. 443, p. 350, L. 1877; re-en. Sec. 443, 2nd Div. Rev. Stat. 1879; re-en. Sec. 443, 2nd Div. Comp. Stat. 1887; re-en. Sec. 1728, Civ. C. 1895; re-en. Sec. 4731, Rev. C. 1907; re-en. Sec. 6985, R.C.M. 1921; Cal. Civ. C. Sec. 1281; Field Civ. C. Sec. 549; re-en. Sec. 6985, R.C.M. 1935; R.C.M. 1947, 91-112.**

**72-11-203. Subsequent incompetency of witness — effect.** If the subscribing witnesses to a will are competent at the time of attesting its execution, their subsequent incompetency, from whatever cause it may arise, does not prevent the probate and allowance of the will if it is otherwise satisfactorily proved.

**History: En. Sec. 5, p. 556, Cod. Stat. 1871; re-en. Sec. 442, p. 350, L. 1877; re-en. Sec. 442, 2nd Div. Rev. Stat. 1879; re-en. Sec. 442, 2nd Div. Comp. Stat. 1887; re-en. Sec. 1727, Civ. C. 1895; re-en. Sec. 4730, Rev. C. 1907; re-en. Sec. 6984, R.C.M. 1921; Cal. Civ. C. Sec. 1280; re-en. Sec. 6984, R.C.M. 1935; R.C.M. 1947, 91-111.**

**72-11-204. Alteration of testator's interest by subsequent instrument — when a revocation.** If the instrument by which an alteration is made of the testator's interest in a thing previously disposed of by his will expresses his intent that it shall be a revocation or if it contains provisions wholly inconsistent with the terms and nature of the testamentary disposition, it operates as a revocation thereof, unless such inconsistent provisions depend on a condition or contingency by reason of which they do not take effect.

**History: En. Sec. 464, p. 354, L. 1877; re-en. Sec. 464, 2nd Div. Rev. Stat. 1879; re-en. Sec. 464, 2nd Div. Comp. Stat. 1887; re-en. Sec. 1749, Civ. C. 1895;**

**re-en. Sec. 4752, Rev. C. 1907; re-en. Sec. 7006, R.C.M. 1921; Cal. Civ. C. Sec. 1304; Field Civ. C. Sec. 572; re-en. Sec. 7006, R.C.M. 1935; R.C.M. 1947, 91-133.**

**72-11-205. Revocation of duplicate.** The revocation of a will executed in duplicate may be made by revoking one of the duplicates.

**History: En. Sec. 455, p. 352, L. 1877; re-en. Sec. 455, 2nd Div. Rev. Stat. 1879; re-en. Sec. 455, 2nd Div. Comp. Stat. 1887; re-en. Sec. 1740, Civ. C. 1895; re-en. Sec. 4743, Rev. C. 1907; re-en. Sec. 6997, R.C.M. 1921; Field Civ. C. Sec. 564; re-en. Sec. 6997, R.C.M. 1935; R.C.M. 1947, 91-124.**

## Part 3

## Wills — Construction and Operation

**72-11-301. Rules of construction — applicability.** In interpreting a will subject to the law of this state, the rules prescribed by the following sections of this part are to be observed, unless an intention to the contrary clearly appears.

**History: En. Sec. 476, p. 356, L. 1877; re-en. Sec. 476, 2nd Div. Rev. Stat. 1879; re-en. Sec. 476, 2nd Div. Comp. Stat. 1887; re-en. Sec. 1772, Civ. C. 1895; re-en. Sec. 4765, Rev. C. 1907; re-en. Sec. 7018, R.C.M. 1921; Cal. Civ. C. Sec. 1319; Field Civ. C. Sec. 581; re-en. Sec. 7018, R.C.M. 1935; R.C.M. 1947, 91-203.**

**72-11-302. Words to be construed in ordinary sense.** The words of a will are to be taken in their ordinary and grammatical sense, unless a clear intention to use them in another sense can be collected and that other can be ascertained.

**History: En. Sec. 481, p. 357, L. 1877; re-en. Sec. 481, 2nd Div. Rev. Stat. 1879; re-en. Sec. 481, 2nd Div. Comp. Stat. 1887; re-en. Sec. 1777, Civ. C. 1895; re-en. Sec. 4770, Rev. C. 1907; re-en. Sec. 7023, R.C.M. 1921; Cal. Civ. C. Sec. 1324; Field Civ. C. Sec. 586; re-en. Sec. 7023, R.C.M. 1935; R.C.M. 1947, 91-208.**

**72-11-303. Words to be construed to have some effect.** The words of a will are to receive an interpretation which will give to every expression some effect, rather than one which will render any of the expressions inoperative.

**History: En. Sec. 482, p. 357, L. 1877; re-en. Sec. 482, 2nd Div. Rev. Stat. 1879; re-en. Sec. 482, 2nd Div. Comp. Stat. 1887; re-en. Sec. 1778, Civ. C. 1895; re-en. Sec. 4771, Rev. C. 1907; re-en. Sec. 7024, R.C.M. 1921; Cal. Civ. C. Sec. 1325; Field Civ. C. Sec. 587; re-en. Sec. 7024, R.C.M. 1935; R.C.M. 1947, 91-209.**

**72-11-304. Extrinsic evidence inadmissible — exceptions.** (1) When the terms of an agreement have been reduced to writing by the parties, it is to be considered as containing all those terms, and therefore there can be between the parties and their representatives or successors in interest no evidence of the terms of the agreement other than the contents of the writing, except in the following cases:

(a) where a mistake or imperfection of the writing is put in issue by the pleadings;

(b) where the validity of the agreement is the fact in dispute.

(2) But this section does not exclude other evidence of the circumstances under which the agreement was made or to which it relates, as defined in 1-4-102, or to explain an extrinsic ambiguity or to establish illegality or fraud.

(3) The term agreement includes deeds and wills, as well as contracts between parties.

**History: En. Sec. 610, p. 198, L. 1877; re-en. Sec. 610, 1st Div. Rev. Stat. 1879; re-en. Sec. 628, 1st Div. Comp. Stat. 1887; re-en. Sec. 3132, C. Civ. Proc. 1895; re-en. Sec. 7873, Rev. C. 1907; re-en. Sec. 10517, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1856; re-en. Sec. 10517, R.C.M. 1935; R.C.M. 1947, 93-401-13.**

**72-11-305. Ambiguity explained by reference in other part of will.** Where the meaning of any part of a will is ambiguous or doubtful, it may be explained by any reference thereto or recital thereof in another part of the will.

**History: En. Sec. 480, p. 356, L. 1877; re-en. Sec. 480, 2nd Div. Rev. Stat. 1879; re-en. Sec. 480, 2nd Div. Comp. Stat. 1887; re-en. Sec. 1776, Civ. C. 1895; re-en. Sec. 4769, Rev. C. 1907; re-en. Sec. 7022, R.C.M. 1921; Cal. Civ. C. Sec. 1323; Field Civ. C. Sec. 585; re-en. Sec. 7022, R.C.M. 1935; R.C.M. 1947, 91-207.**

**72-11-306. Several instruments to be construed together.** Several testamentary instruments executed by the same testator are to be taken and construed together as one instrument.

**History: En. Sec. 477, p. 356, L. 1877; re-en. Sec. 477, 2nd Div. Rev. Stat. 1879; re-en. Sec. 477, 2nd Div. comp. Stat. 1887; re-en. Sec. 1773, Civ. C. 1895; re-en. Sec. 4766, Rev. C. 1907; re-en. Sec. 7019, R.C.M. 1921; Cal. Civ. C. Sec. 1320; Field Civ. C. Sec. 582; re-en. Sec. 7019, R.C.M. 1935; R.C.M. 1947, 91-204.**

**72-11-307. Harmonizing various parts.** All the parts of a will are to be construed in relation to each other so as, if possible, to form one consistent whole; but where several parts are absolutely irreconcilable, the latter must prevail.

**History: En. Sec. 478, p. 356, L. 1877; re-en. Sec. 478, 2nd Div. Rev. Stat. 1879; re-en. Sec. 478, 2nd Div. Comp. Stat. 1887; re-en. Sec. 1774, Civ. C. 1895; re-en. Sec. 4767, Rev. C. 1907; re-en. Sec. 7020, R.C.M. 1921; Cal. Civ. C. Sec. 1321; Field Civ. C. Sec. 583; re-en. Sec. 7020, R.C.M. 1935; R.C.M. 1947, 91-205.**

**72-11-308. Clear devise not affected by other parts of will.** A clear and distinct devise or bequest cannot be affected by any reasons assigned therefor or by any other words not equally clear and distinct or by inference or argument from other parts of the will or by an inaccurate recital of or reference to its contents in another part of the will.

**History: En. Sec. 479, p. 356, L. 1877; re-en. Sec. 479, 2nd Div. Rev. Stat. 1879; re-en. Sec. 479, 2nd Div. Comp. Stat. 1887; re-en. Sec. 1775, Civ. C. 1895; re-en. Sec. 4768, Rev. C. 1907; re-en. Sec. 7021, R.C.M. 1921; Cal. Civ. C. Sec. 1322; Field Civ. C. Sec. 584; re-en. Sec. 7021, R.C.M. 1935; R.C.M. 1947, 91-206.**

**72-11-309. Technical words to be construed in technical sense.** Technical words in a will are to be taken in their technical sense unless the context clearly indicates a contrary intention.

**History: En. Sec. 484, p. 357, L. 1877; re-en. Sec. 484, 2nd Div. Rev. Stat. 1879; re-en. Sec. 484, 2nd Div. Comp. Stat. 1887; re-en. Sec. 1780, Civ. C. 1895; re-en. Sec. 4773, Rev. C. 1907; re-en. Sec. 7026, R.C.M. 1921; Cal. Civ. C. Sec. 1327; Field Civ. C. Sec. 589; re-en. Sec. 7026, R.C.M. 1935; R.C.M. 1947, 91-211.**

**72-11-310. Technical words not necessary.** Technical words are not necessary to give effect to any species of disposition by a will.

**History: En. Sec. 485, p. 357, L. 1877; re-en. Sec. 485, 2nd Div. Rev. Stat. 1879; re-en. Sec. 485, 2nd Div. Comp. Stat. 1887; re-en. Sec. 1781, Civ. C. 1895;**

**re-en. Sec. 4774, Rev. C. 1907; re-en. Sec. 7027, R.C.M. 1921; Cal. Civ. C. Sec. 1328; Field Civ. C. Sec. 590; re-en. Sec. 7027, R.C.M. 1935; R.C.M. 1947, 91-212.**

**72-11-311. Words of inheritance not necessary to devise a fee.** The term "heirs" or other words of inheritance are not requisite to devise a fee, and a devise of real property passes all the estate of the testator, unless otherwise limited.

**History: En. Sec. 486, p. 357, L. 1877; re-en. Sec. 486, 2nd Div. Rev. Stat. 1879; re-en. Sec. 486, 2nd Div. Comp. Stat. 1887; re-en. Sec. 1782, Civ. C. 1895; re-en. Sec. 4775, Rev. C. 1907; re-en. Sec. 7028, R.C.M. 1921; Cal. Civ. C. Sec. 1329; Field Civ. C. Sec. 591; re-en. Sec. 7028, R.C.M. 1935; R.C.M. 1947, 91-213.**

**72-11-312. Words referring to death or survivorship — construction.** Words in a will referring to death or survivorship, simply, relate to the time of the testator's death, unless possession is actually postponed, when they must be referred to the time of possession.

**History: En. Sec. 493, p. 358, L. 1877; re-en. Sec. 493, 2nd Div. Rev. Stat. 1879; re-en. Sec. 493, 2nd Div. Comp. Stat. 1887; re-en. Sec. 1789, Civ. C. 1895; re-en. Sec. 4782, Rev. C. 1907; re-en. Sec. 7035, R.C.M. 1921; Cal. Civ. C. Sec. 1336; Field Civ. C. Sec. 598; re-en. Sec. 7035, R.C.M. 1935; R.C.M. 1947, 91-220.**

**72-11-313. Admissibility of evidence to correct errors and omissions as to description.** When, applying a will, it is found that there is an imperfect description or that no person or property exactly answers the description, mistakes and omissions must be corrected if the error appears from the context of the will or from extrinsic evidence; but evidence of the declarations of the testator as to his intentions cannot be received.

**History: En. Sec. 497, p. 359, L. 1877; re-en. Sec. 497, 2nd Div. Rev. Stat. 1879; re-en. Sec. 497, 2nd Div. Comp. Stat. 1887; re-en. Sec. 1793, Civ. C. 1895; re-en. Sec. 4786, Rev. C. 1907; re-en. Sec. 7039, R.C.M. 1921; Cal. Civ. C. Sec. 1340; Based on Field Civ. C. Sec. 602; re-en. Sec. 7039, R.C.M. 1935; R.C.M. 1947, 91-224.**

**72-11-314. Conditional disposition defined.** A conditional disposition is one which depends upon the occurrence of some uncertain event by which it is either to take effect or be defeated.

**History: En. Sec. 502, p. 360, L. 1877; re-en. Sec. 502, 2nd Div. Rev. Stat. 1879; re-en. Sec. 502, 2nd Div. Comp. Stat. 1887; re-en. Sec. 1798, Civ. C. 1895; re-en. Sec. 4791, Rev. C. 1907; re-en. Sec. 7044, R.C.M. 1921; Cal. Civ. C. Sec. 1345; Field Civ. C. Sec. 607; re-en. Sec. 7044, R.C.M. 1935; R.C.M. 1947, 91-229.**

**72-11-315. Condition precedent defined.** A condition precedent in a will is one which is required to be fulfilled before a particular disposition takes effect.

**History: En. Sec. 503, p. 360, L. 1877; re-en. Sec. 503, 2nd Div. Rev. Stat. 1879; re-en. Sec. 503, 2nd Div. Comp. Stat. 1887; re-en. Sec. 1799, Civ. C. 1895; re-en. Sec. 4792, Rev. C. 1907; re-en. Sec. 7045, R.C.M. 1921; Cal. Civ. C. Sec. 1346; Field Civ. C. Sec. 608; re-en. Sec. 7045, R.C.M. 1935; R.C.M. 1947, 91-230.**

**72-11-316. Effect of condition precedent.** Where a testamentary disposition is made upon a condition precedent, nothing vests until the condition is fulfilled, except where such fulfillment is impossible, in which case the disposition vests, unless the condition was the sole motive thereof and the impossibility was unknown to the testator or arose from an unavoidable event subsequent to the execution of the will.

**History: En. Sec. 504, p. 360, L. 1877; re-en. Sec. 504, 2nd Div. Rev. Stat. 1879; re-en. Sec. 504, 2nd Div. Comp. Stat. 1887; re-en. Sec. 1800, Civ. C. 1895; re-en. Sec. 4793, Rev. C. 1907; re-en. Sec. 7046, R.C.M. 1921; Cal. Civ. C. Sec. 1347; Field Civ. C. Sec. 609; re-en. Sec. 7046, R.C.M. 1935; R.C.M. 1947, 91-231.**

**72-11-317. Condition precedent — when considered performed.** A condition precedent in a will is to be deemed performed when the testator's intention has been substantially though not literally complied with.

**History: En. Sec. 505, p. 360, L. 1877; re-en. Sec. 505, 2nd Div. Rev. Stat. 1879; re-en. Sec. 505, 2nd Div. Comp. Stat. 1887; re-en. Sec. 1801, Civ. C. 1895; re-en. Sec. 4794, Rev. C. 1907; re-en. Sec. 7047, R.C.M. 1921; Cal. Civ. C. Sec. 1348; Field Civ. C. Sec. 610; re-en. Sec. 7047, R.C.M. 1935; R.C.M. 1947, 91-232.**

**72-11-318. Condition subsequent defined.** A condition subsequent is where an estate or interest is so given as to vest immediately, subject only to being divested by some subsequent act or event.

**History: En. Sec. 506, p. 360, L. 1877; re-en. Sec. 506, 2nd Div. Rev. Stat. 1879; re-en. Sec. 506, 2nd Div. Comp. Stat. 1887; re-en. Sec. 1802, Civ. C. 1895; re-en. Sec. 4795, Rev. C. 1907; re-en. Sec. 7048, R.C.M. 1921; Cal. Civ. C. Sec. 1349; Field Civ. C. Sec. 611; re-en. Sec. 7048, R.C.M. 1935; R.C.M. 1947, 91-233.**

**72-11-319. Devise to more than one person.** A devise or legacy given to more than one person vests in them as owners in common.

**History: En. Sec. 507, p. 360, L. 1877; re-en. Sec. 507, 2nd Div. Rev. Stat. 1879; re-en. Sec. 507, 2nd Div. Comp. Stat. 1887; re-en. Sec. 1803, Civ. C. 1895; re-en. Sec. 4796, Rev. C. 1907; re-en. Sec. 7049, R.C.M. 1921; Cal. Civ. C. Sec. 1350; Field Civ. C. Sec. 612; re-en. Sec. 7049, R.C.M. 1935; R.C.M. 1947, 91-234.**

**72-11-320. Devise to a class — who included.** A testamentary disposition to a class includes every person answering the description at the testator's death; but when the possession is postponed to a future period, it includes also all persons coming within the description before the time to which possession is postponed.

**History: En. Sec. 494, p. 358, L. 1877; re-en. Sec. 494, 2nd Div. Rev. Stat. 1879; re-en. Sec. 494, 2nd Div. Comp. Stat. 1887; re-en. Sec. 1790, Civ. C. 1895; re-en. Sec. 4783, Rev. C. 1907; re-en. Sec. 7036, R.C.M. 1921; Cal. Civ. C. Sec. 1337; Field Civ. C. Sec. 599; re-en. Sec. 7036, R.C.M. 1935; R.C.M. 1947, 91-221.**

**72-11-321. Afterborn child included in class.** A child conceived before but not born until after a testator's death or any other period when a disposition to a class vests in right or in possession takes if answering to the description of the class.

**History: En. Sec. 496, p. 359, L. 1877; re-en. Sec. 496, 2nd Div. Rev. Stat. 1879; re-en. Sec. 496, 2nd Div. Comp. Stat. 1887; re-en. Sec. 1792, Civ. C. 1895; re-en. Sec. 4785, Rev. C. 1907; re-en. Sec. 7038, R.C.M. 1921; Cal. Civ. C. Sec. 1339; Field Civ. C. Sec. 601; re-en. Sec. 7038, R.C.M. 1935; R.C.M. 1947, 91-223.**

**72-11-322. Realty to be converted considered personalty from time of death.** When a will directs the conversion of real property into money, such property and all its proceeds must be deemed personal property from the time of the testator's death.

**History: En. Sec. 495, p. 359, L. 1877; re-en. Sec. 495, 2nd Div. Rev. Stat. 1879; re-en. Sec. 495, 2nd Div. Comp. Stat. 1887; re-en. Sec. 1791, Civ. C. 1895;**

**re-en. Sec. 4784, Rev. C. 1907; re-en. Sec. 7037, R.C.M. 1921; Cal. Civ. C. Sec. 1338; Field Civ. C. Sec. 600; re-en. Sec. 7037, R.C.M. 1935; R.C.M. 1947, 91-222.**

**72-11-323 through 72-11-330 reserved.**

**72-11-331. When disposition cannot be divested.** A testamentary disposition, when vested, cannot be divested unless upon the occurrence of the precise contingency prescribed by the testator for that purpose.

**History: En. Sec. 499, p. 359, L. 1877; re-en. Sec. 499, 2nd Div. Rev. Stat. 1879; re-en. Sec. 499, 2nd Div. Comp. Stat. 1887; re-en. Sec. 1795, Civ. C. 1895; re-en. Sec. 4788, Rev. C. 1907; re-en. Sec. 7041, R.C.M. 1921; Cal. Civ. C. Sec. 1342; Field Civ. C. Sec. 604; re-en. Sec. 7041, R.C.M. 1935; R.C.M. 1947, 91-226.**

**72-11-332. Interests in remainder not defeated by death of other devisee.** The death of a devisee or legatee of a limited interest before the testator's death does not defeat the interests of persons in remainder who survive the testator.

**History: En. Sec. 501, p. 359, L. 1877; re-en. Sec. 501, 2nd Div. Rev. Stat. 1879; re-en. Sec. 501, 2nd Div. Comp. Stat. 1887; re-en. Sec. 1797, Civ. C. 1895; re-en. Sec. 4790, Rev. C. 1907; re-en. Sec. 7043, R.C.M. 1921; Cal. Civ. C. Sec. 1344; Field Civ. C. Sec. 606; re-en. Sec. 7043, R.C.M. 1935; R.C.M. 1947, 91-228.**

**72-11-333. Devise of land to include entire interest of testator.** Every devise of land in any will conveys all the estate of the devisor therein which he could lawfully devise, unless it clearly appears by the will that he intended to convey a less estate.

**History: En. Sec. 2, p. 555, Cod. Stat. 1871; re-en. Sec. 471, p. 355, L. 1877; re-en. Sec. 471, 2nd Div. Rev. Stat. 1879; re-en. Sec. 471, 2nd Div. Comp. Stat. 1887; re-en. Sec. 1756, Civ. C. 1895; re-en. Sec. 4759, Rev. C. 1907; re-en. Sec. 7013, R.C.M. 1921; Cal. Civ. C. Sec. 1311; re-en. Sec. 7013, R.C.M. 1935; R.C.M. 1947, 91-140.**

**72-11-334. Restrictions on devise to charity.** No estate, real or personal, shall be bequeathed or devised to any charitable or benevolent society or corporation or to any person or persons in trust for charitable uses except the same be done by will duly executed at least 30 days before the decease of the testator, and if so made at least 30 days prior to such death, such devise or legacy and each of them shall be valid; provided, that the prohibition contained in this section shall not apply to cases where not more than one-third of the estate of the testator shall be bequeathed or devised for charitable or benevolent purposes, and provided further, that if any such devise or bequest be made in a will executed within 30 days prior to such death and be for more than one-third of the estate of the decedent, the same shall be void as to the excess over one-third but as to that only.

**History: En. Sec. 1, p. 69, L. 1893; re-en. Sec. 1759, Civ. C. 1895; re-en. Sec. 4762, Rev. C. 1907; re-en. Sec. 7015, R.C.M. 1921; Cal. Civ. C. Sec. 1313; re-en. Sec. 7015, R.C.M. 1935; amd. Sec. 1, Ch. 93, L. 1945; R.C.M. 1947, 91-142.**

## CHAPTER 12

## PROBATE AND ADMINISTRATION SUPPLEMENTARY PROVISIONS

### Part 1 — General Provisions

Section

72-12-101. Continuing jurisdiction over testamentary trust.
72-12-102. Compensation of testamentary trustee.

72-12-103. Appeal from order settling account of testamentary trustee.
72-12-104. Duty of tenant for life in legacy to deliver inventory.

### Part 2 — Will Contest—Procedure

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## Part 1

## General Provisions

**72-12-101. Continuing jurisdiction over testamentary trust.** Where any trust has been created by or under any will to continue after distribution, the district court shall not lose jurisdiction of the estate by final distribution but shall retain jurisdiction thereof for the purpose of the settlement of accounts under the trust as provided in chapters 20 through 30.

**History: En. Sec. 2900, C. Civ. Proc. 1895; re-en. Sec. 7698, Rev. C. 1907; re-en. Sec. 10352, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1699; re-en. Sec. 10352, R.C.M. 1935; amd. Sec. 2, Ch. 24, L. 1969; R.C.M. 1947, 91-4201.**

**72-12-102. Compensation of testamentary trustee.** On all such accountings, the court or judge shall allow the trustee or trustees the proper expenses and such compensation for services as the court or judge may deem to be just and reasonable and shall apportion such compensation among the trustees according to the services rendered by them respectively and may, in its discretion, fix a yearly compensation for the trustee or trustees, to continue as long as the court or judge may deem proper.

**History: En. Sec. 2901, C. Civ. Proc. 1895; re-en. Sec. 7699, Rev. C. 1907; re-en. Sec. 10353, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1700; re-en. Sec. 10353, R.C.M. 1935; R.C.M. 1947, 91-4202.**

**72-12-103. Appeal from order settling account of testamentary trustee.** (1) From an order settling such account appeal may be taken in the manner provided for an appeal from an order settling the account of an executor or administrator.

(2) The order of the district court, if affirmed on appeal or becoming final without appeal, shall be conclusive.

**History: En. Sec. 2902, C. Civ. Proc. 1895; re-en. Sec. 7700, Rev. C. 1907; re-en. Sec. 10354, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1701; re-en. Sec. 10354, R.C.M. 1935; R.C.M. 1947, 91-4203.**

**72-12-104. Duty of tenant for life in legacy to deliver inventory.** When specific legacies are for life only, the first legatee must sign and deliver to the second legatee, or if there is none, to the personal representative, an inventory of the property, expressing that the same is in his custody for life only and that on his decease it is to be delivered and to remain to the use and for the benefit of the second legatee or to the personal representative, as the case may be.

**History: En. Secs. 509-530, pp. 360-363, L. 1877; re-en. Secs. 509-530, 2nd Div. Rev. Stat. 1879; re-en. Secs. 509-530, 2nd Div. Comp. Stat. 1887; re-en. Sec. 1828, Civ. C. 1895; re-en. Sec. 4806, Rev. C. 1907; re-en. Sec. 7059, R.C.M. 1921;**

**Cal. Civ. C. Sec. 1365; Field Civ. C. Sec. 622; re-en. Sec. 7059, R.C.M. 1935; R.C.M. 1947, 91-309.**

## Part 2

## Will Contest — Procedure

**72-12-201. How jury impaneled and trial had.** When a jury is demanded, the district court must impanel a jury to try the case in the manner provided for impaneling juries in courts of record, and the trial must be conducted in accordance with the provisions of Title 25, chapter 7, part 2 and Rule 47, M.R.Civ.P. A trial by the court must be conducted as provided in Title 25, chapter 7, part 6; 25-9-104; and M.R.Civ.P., Rules 38(d), 39(b), and 52.

**History: En. Sec. 21, p. 245, L. 1877; re-en. Sec. 21, 2nd Div. Rev. Stat. 1879; re-en. Sec. 21, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2341, C. Civ. Proc. 1895; re-en. Sec. 7398, Rev. C. 1907; re-en. Sec. 10033, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1313; re-en. Sec. 10033, R.C.M. 1935; R.C.M. 1947, 91-902.**

**72-12-202. Jury verdict — judgment — proofs reduced to writing.** The jury after hearing the case must return a special verdict upon the issues submitted to it by the court, upon which the judgment of the court must be rendered, either admitting the will to probate or rejecting it. In either case, the proofs of the subscribing witnesses must be reduced to writing. If the will be admitted to probate, the judgment, will, and proofs must be recorded.

**History: En. Sec. 22, p. 245, L. 1877; re-en. Sec. 22, 2nd Div. Rev. Stat. 1879; re-en. Sec. 22, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2342, C. Civ. Proc. 1895; re-en. Sec. 7399, Rev. C. 1907; re-en. Sec. 10034, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1314; re-en. Sec. 10034, R.C.M. 1935; R.C.M. 1947, 91-903.**

**72-12-203. Testimony reduced to writing — good evidence in subsequent contest — filing.** (1) The testimony of each witness, reduced to writing and signed by him, shall be good evidence in any subsequent contests concerning the validity of the will or the sufficiency of the proof thereof if the witness be dead or has permanently removed from this state.

(2) All testimony shall be filed by the clerk.

**History: (1)En. Sec. 24, p. 246, L. 1877; re-en. Sec. 24, 2nd Div. Rev. Stat. 1879; re-en. Sec. 24, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2344, C. Civ. Proc. 1895; re-en. Sec. 7401, Rev. C. 1907; re-en. Sec. 10036, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1316; re-en. Sec. 10036, R.C.M. 1935; Sec. 91-905, R.C.M. 1947; (2)En. Sec. 26, p. 246, L. 1877; re-en. Sec. 26, p. 197, 2nd Div. Rev. Stat. 1879; re-en. Sec. 26, 2nd Div. Comp. Stat. 1887; amd. Sec. 26, 2nd Div. Comp. Stat. 1887; amd. Sec. 2346, C. Civ. Proc. 1895; re-en. Sec. 7403, Rev. C. 1907; re-en. Sec. 10038, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1318; re-en. Sec. 10038, R.C.M. 1935; Sec. 91-907, R.C.M. 1947; R.C.M. 1947, 91-905, 91-907(part).**

**72-12-204. Certificate to be attached when will found valid.** If the court or judge is satisfied upon the proof taken or from the facts found by the jury that the will was duly executed and that the testator at the time of its execution was of sound and disposing mind and not acting under duress, menace, fraud, or undue influence, a certificate of the proof and the facts found, signed by the judge and attested by the seal of the court, must be attached to the will.

**History: En. Sec. 25, p. 246, L. 1877; re-en. Sec. 25, 2nd Div. Rev. Stat. 1879; re-en. Sec. 25, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2345, C. Civ. Proc. 1895;**

**re-en. Sec. 7402, Rev. C. 1907; re-en. Sec. 10037, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1317; re-en. Sec. 10037, R.C.M. 1935; R.C.M. 1947, 91-906.**

**72-12-205. Will and certificate to be filed.** The will and a certificate of the proof thereof must be filed and recorded by the clerk, and the same when so filed and recorded shall constitute part of the record in the cause or proceeding.

**History: En. Sec. 26, p. 246, L. 1877; re-en. Sec. 26, p. 197, 2nd Div. Rev. Stat. 1879; re-en. Sec. 26, 2nd Div. Comp. Stat. 1887; amd. Sec. 26, 2nd Div. Comp. Stat. 1887; amd. Sec. 2346, C. Civ. Proc. 1895; re-en. Sec. 7403, Rev. C. 1907; re-en. Sec. 10038, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1318; re-en. Sec. 10038, R.C.M. 1935; R.C.M. 1947, 91-907(part).**

**72-12-206. Fees and expenses — by whom paid.** When the validity or probate of a will is contested through court action, the fees and expenses must be paid by the party contesting the validity or probate of the will, if the will in probate is confirmed. If the probate is revoked, the costs must be paid by the party who resisted the revocation or out of the property of the decedent, as the court directs.

**History: En. Sec. 35, p. 248, L. 1877; re-en. Sec. 35, 2nd Div. Rev. Stat. 1879; re-en. Sec. 35, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2365, C. Civ. Proc. 1895; re-en. Sec. 7412, Rev. C. 1907; re-en. Sec. 10047, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1332; re-en. Sec. 10047, R.C.M. 1935; amd. Sec. 16, Ch. 365, L. 1974; R.C.M. 1947, 91-1106.**

## Part 3

## Lost Wills — Procedure

**72-12-301. Lost will — certificate of contents — letters to issue — testimony to be filed.** (1) When a lost will is established, the provisions thereof must be distinctly stated and certified by the judge, under his hand and the seal of the court.

(2) The certificate must be filed and recorded as other wills are filed and recorded, and letters testamentary or of administration with the will annexed must be issued thereon in the same manner as upon wills produced and duly proved.

(3) The testimony must be reduced to writing, signed, certified, and filed as in other cases and shall have the same effect as evidence as provided in 72-12-203.

**History: En. Sec. 39, p. 249, L. 1877; re-en. Sec. 39, 2nd Div. Rev. Stat. 1879; re-en. Sec. 39, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2372, C. Civ. Proc. 1895; re-en. Sec. 7416, Rev. C. 1907; re-en. Sec. 10051, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1340; re-en. Sec. 10051, R.C.M. 1935; R.C.M. 1947, 91-1203.**

**72-12-302. Restraint of injurious acts when other letters issued.** If, before or during the pendency of an application to prove a lost or destroyed will, letters of administration are granted on the estate of the testator or letters testamentary of any previous will of the testator are granted, the court may restrain the administrators or executors so appointed from any acts or proceedings which would be injurious to the legatees or devisees claiming under the lost or destroyed will.

**History: En. Sec. 40, p. 249, L. 1877; re-en. Sec. 40, 2nd Div. Rev. Stat. 1879; re-en. Sec. 40, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2373, C. Civ. Proc. 1895; re-en. Sec. 7417, Rev. C. 1907; re-en. Sec. 10052, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1341; re-en. Sec. 10052, R.C.M. 1935; R.C.M. 1947, 91-1204.**

## Part 4

## Handwriting Analysis

**72-12-401. Petition for handwriting analysis.** In any proceeding involving the probate, either contested or uncontested, of a will in which the signature of the testator or of any witness is an issue, any party to the proceeding may file with the court a verified petition requesting that the original will be delivered to a handwriting expert residing and having his place of business outside the state or outside the county for an examination of any of the signatures on the will.

**History: En. Sec. 1, Ch. 13, L. 1974; R.C.M. 1947, 91-813.**

**72-12-402. Court to determine necessity of procedure and qualifications of expert.** The court, upon notice and hearing, shall determine whether the procedure is justified by the circumstances of the case and whether the handwriting expert specified in the petition is a qualified professional handwriting expert.

**History: En. Sec. 2, Ch. 13, L. 1974; R.C.M. 1947, 91-814.**

**72-12-403. Clerk to mail will to expert — notice.** If the court grants the petition for delivery of the original will to a qualified handwriting expert residing and having his place of business outside the county or state, the clerk of court shall make at least two photocopies of the original will, which photocopies shall remain in the custody of the clerk of court. The clerk shall mail the original will by registered or certified mail, return receipt requested, to the handwriting expert specified in the order and shall give notice of the mailing by mailing copies of the order to each of the parties to the proceeding and to the handwriting expert.

**History: En. Sec. 3, Ch. 13, L. 1974; R.C.M. 1947, 91-815.**

**72-12-404. Expert to return will to clerk.** Upon completion of his analysis, the handwriting expert shall return the original will to the clerk of court by registered or certified mail, return receipt requested.

**History: En. Sec. 4, Ch. 13, L. 1974; R.C.M. 1947, 91-816.**

**72-12-405. Expert to mail report to petitioner.** Unless the court orders another disposition of the written report, the handwriting expert, upon completion of his analysis, shall mail his written report to the party who requested it.

**History: En. Sec. 5, Ch. 13, L. 1974; R.C.M. 1947, 91-817.**

**72-12-406. Petitioner to pay all fees.** All fees and expenses arising from the procedure outlined in this part, including the cost of photocopying the will, the expense of all registered or certified mailings, and the handwriting expert's fee, shall be paid by the party requesting the handwriting analysis.

**History: En. Sec. 6, Ch. 13, L. 1974; R.C.M. 1947, 91-818.**

**72-12-407. Report property of petitioner unless interested party shares fees.** Unless the court otherwise orders, the handwriting expert's written report shall be the sole and exclusive property of the party requesting it. However, upon demand and the payment of his pro rata share of the fees and costs of the handwriting expert, as shall be determined by the court, any interested party may obtain a certified copy of the written report.

**History: En. Sec. 7, Ch. 13, L. 1974; R.C.M. 1947, 91-819.**

## Part 5

## Personal Representative

**72-12-501. Several persons entitled to appointment — discretion of court.** When there are several persons equally entitled to the administration, the court or judge may grant letters to one or more of them.

**History: En. Sec. 57, p. 254, L. 1877; re-en. Sec. 57, 2nd Div. Rev. Stat. 1879; re-en. Sec. 57, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2432, C. Civ. Proc. 1895; re-en. Sec. 7434, Rev. C. 1907; re-en. Sec. 10070, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1367; re-en. Sec. 10070, R.C.M. 1935; R.C.M. 1947, 91-1403.**

**72-12-502. Individual liability for costs.** When a judgment is recovered with costs against any executor or administrator, he shall be individually liable for such costs, but they must be allowed him in his administration accounts unless it appears that the suit or proceeding in which the costs were taxed was prosecuted or defended without just cause.

**History: En. Sec. 166, p. 282, L. 1877; re-en. Sec. 166, 2nd Div. Rev. Stat. 1879; re-en. Sec. 166, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2619, C. Civ. Proc. 1895; re-en. Sec. 7541, Rev. C. 1907; re-en. Sec. 10190, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1509; re-en. Sec. 10190, R.C.M. 1935; R.C.M. 1947, 91-2721.**

**72-12-503. Unnecessary to join executors not qualified.** In actions by or against executors, it is not necessary to join those as parties to whom letters were issued but who have not qualified.

**History: En. Sec. 231, p. 301, L. 1877; re-en. Sec. 231, 2nd Div. Rev. Stat. 1879; re-en. Sec. 231, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2736, C. Civ. Proc. 1895; re-en. Sec. 7609, Rev. C. 1907; re-en. Sec. 10263, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1587; re-en. Sec. 10263, R.C.M. 1935; R.C.M. 1947, 91-3207.**

## Part 6

## Third Parties Handling Estate Property — Recovery — Account

**72-12-601. Action for misappropriation of estate prior to appointment — double recovery.** If any person, before the granting of letters testamentary or of administration, commits theft of or alienates any of the moneys, goods, chattels, or effects of a decedent, he is charged therewith and liable to an action by the executor or administrator of the estate for double the value of the property so mishandled to be recovered for the benefit of the estate.

**History: En. Sec. 129, p. 270, L. 1877; re-en. Sec. 129, 2nd Div. Rev. Stat. 1879; re-en. Sec. 129, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2570, C. Civ. Proc. 1895; re-en. Sec. 7504, Rev. C. 1907; re-en. Sec. 10140, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1458; re-en. Sec. 10140, R.C.M. 1935; amd. Sec. 66, Ch. 359, L. 1977; R.C.M. 1947, 91-2301.**

**72-12-602. Citation to person suspected of misappropriation of estate — expenses if innocent.** If any executor or administrator or any person interested in the estate of a decedent complains to the court or judge, on oath, that any person is suspected of having concealed, smuggled, conveyed away, disposed of, or committed theft of any moneys, goods, or chattels of the decedent or has in his possession or knowledge any deeds, conveyances, bonds, contracts, or other writings which contain evidences of or tend to disclose the right, title, interest, or claim of the decedent to any real or personal estate, any claim or demand, or any lost will, the court or judge may cite such person to appear before the court and may examine him on oath upon the matter of the complaint. If such person is not in the county where the decedent dies or where letters have been granted, he may be cited and examined either before the district court or judge of the county where the decedent dies or where letters have been granted. But if he appears and is found innocent, his necessary expenses must be allowed him out of the estate.

**History: En. Sec. 130, p. 270, L. 1877; re-en. Sec. 130, 2nd Div. Rev. Stat. 1879; re-en. Sec. 130, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2571, C. Civ. Proc. 1895; re-en. Sec. 7505, Rev. C. 1907; re-en. Sec. 10141, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1459; re-en. Sec. 10141, R.C.M. 1935; amd. Sec. 67, Ch. 359, L. 1977; R.C.M. 1947, 91-2302.**

**72-12-603. Refusal to obey citation or order — civil contempt.** If the person so cited refuses to appear and submit to an examination or to answer such interrogatories as may be put to him touching the matters of the complaint, the court or judge may, by warrant for that purpose, commit him to the county jail, there to remain in close custody until he submits to the order of the court or is discharged according to law. If upon examination it appears that he has concealed, smuggled, conveyed away, disposed of, or committed theft of any moneys, goods, or chattels of the decedent or that he has in his possession or knowledge any deeds, conveyances, bonds, contracts, or other writings containing evidence of or tending to disclose the right, title, interest, or claim of the decedent to any real or personal estate, claim, or demand or any lost will of the decedent, the court or judge may make an order requiring such person to disclose his knowledge thereof to the executor or administrator and may commit him to the county jail, there to remain until the order is complied with or he is discharged according to law; and all such interrogatories and answers must be in writing, signed by the party examined, and filed in the court.

**History: En. Sec. 131, p. 271, L. 1877; re-en. Sec. 131, 2nd Div. Rev. Stat. 1879; re-en. Sec. 131, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2572, C. Civ. Proc. 1895; re-en. Sec. 7506, Rev. C. 1907; re-en. Sec. 10142, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1460; re-en. Sec. 10142, R.C.M. 1935; amd. Sec. 68, Ch. 359, L. 1977; R.C.M. 1947, 91-2303(part).**

**72-12-604. Order for disclosure as evidence in action for double recovery — other witnesses.** The order for such disclosure made upon such examination shall be prima facie evidence of the right of the executor or administrator to such property in any action brought for the recovery thereof, and any judgment recovered therein must be for double the value of the property as assessed by the court or jury or for the return of the property and damages in addition thereto equal to the value of such property. In addition to the examination of the party, witnesses may be produced and examined on either side.

**History: En. Sec. 131, p. 271, L. 1877; re-en. Sec. 131, 2nd Div. Rev. Stat. 1879; re-en. Sec. 131, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2572, C. Civ. Proc. 1895; re-en. Sec. 7506, Rev. C. 1907; re-en. Sec. 10142, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1460; re-en. Sec. 10142, R.C.M. 1935; amd. Sec. 68, Ch. 359, L. 1977; R.C.M. 1947, 91-2303(part).**

**72-12-605. Account of third person entrusted with estate assets.** (1) The court or judge, upon the complaint on oath of any executor or administrator, may cite any person who has been entrusted with any part of the estate of the decedent to appear before such court or judge and require him to render a full account on oath of any moneys, goods, chattels, bonds, accounts, or other property or papers belonging to the estate which have come to his possession in trust for the executor or administrator and of his proceedings thereon.

(2) If the person so cited refuses to appear and render such account, the court or judge may proceed against him as provided in 72-12-603 and 72-12-604.

**History: En. Sec. 132, p. 271, L. 1877; re-en. Sec. 132, 2nd Div. Rev. Stat. 1879; re-en. Sec. 132, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2573, C. Civ. Proc. 1895; re-en. Sec. 7507, Rev. C. 1907; re-en. Sec. 10143, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1461; re-en. Sec. 10143, R.C.M. 1935; R.C.M. 1947, 91-2304.**

## Part 7

## Powers and Duties of Surviving Partner

**72-12-701. Right of surviving partner to settle business — inventory and appraisal.** When a partnership exists between the decedent at the time of his death and any other person, the surviving partner has the right to continue in possession of the partnership and to settle its business, but the interest of the decedent in the partnership must be included in the inventory and be appraised as other property.

**History: En. Sec. 229, p. 301, L. 1877; re-en. Sec. 229, 2nd Div. Rev. Stat. 1879; re-en. Sec. 229, 2nd Div. Comp. Stat. 1887; amd. Sec. 1, p. 146, L. 1889; amd. Sec. 2734, C. Civ. Proc. 1895; re-en. Sec. 7607, Rev. C. 1907; re-en. Sec. 10261, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1585; re-en. Sec. 10261, R.C.M. 1935; R.C.M. 1947, 91-3205(part).**

**72-12-702. Bond of surviving partner.** The surviving partner must give a bond with sufficient sureties in favor of the executor or administrator, in a sum at least equal to the value of the interest of the deceased partner in the property of the partnership. The amount of said bond must be fixed and the bond approved by the judge. In case he fails to give such bond, the court or judge may compel its execution by attachment or other proper order.

**History: En. Sec. 229, p. 301, L. 1877; re-en. Sec. 229, 2nd Div. Rev. Stat. 1879; re-en. Sec. 229, 2nd Div. Comp. Stat. 1887; amd. Sec. 1, p. 146, L. 1889; amd. Sec. 2734, C. Civ. Proc. 1895; re-en. Sec. 7607, Rev. C. 1907; re-en. Sec. 10261, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1585; re-en. Sec. 10261, R.C.M. 1935; R.C.M. 1947, 91-3205(part).**

**72-12-703. Accounts of surviving partner.** (1) The surviving partner must settle the affairs of the partnership without delay and account with the executor or administrator and pay over such balances as may from time to time be payable to him, in right of the decedent.

(2) Upon the application of the executor or administrator, the court or judge may, whenever it appears necessary, order the surviving partner to render an account and in case of neglect or refusal may, after notice, compel it by attachment; and the executor or administrator may maintain against him any action which the decedent could have maintained.

**History: En. Sec. 229, p. 301, L. 1877; re-en. Sec. 229, 2nd Div. Rev. Stat. 1879; re-en. Sec. 229, 2nd Div. Comp. Stat. 1887; amd. Sec. 1, p. 146, L. 1889; amd. Sec. 2734, C. Civ. Proc. 1895; re-en. Sec. 7607, Rev. C. 1907; re-en. Sec. 10261, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1585; re-en. Sec. 10261, R.C.M. 1935; R.C.M. 1947, 91-3205(part).**

**72-12-704. Surviving partner as trustee.** The surviving partner is a trustee of the estate or interest of the deceased partner in the property of the partnership for every purpose, and the court or judge may require the surviving partner to account at any time.

**History: En. Sec. 229, p. 301, L. 1877; re-en. Sec. 229, 2nd Div. Rev. Stat. 1879; re-en. Sec. 229, 2nd Div. Comp. Stat. 1887; amd. Sec. 1, p. 146, L. 1889; amd. Sec. 2734, C. Civ. Proc. 1895; re-en. Sec. 7607, Rev. C. 1907; re-en. Sec. 10261, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1585; re-en. Sec. 10261, R.C.M. 1935; R.C.M. 1947, 91-3205(part).**

## Part 8

## Claims Against Estate

**72-12-801. Personal representative's claim — how presented.** Any judge of the district court may present a claim against the estate of a decedent for allowance to the personal representative thereof, and in case of its rejection the personal representative has the same right to petition or sue in a proper court for its recovery as other persons have when their claims against an estate are rejected.

**History: En. Sec. 152, p. 277, L. 1877; re-en. Sec. 152, 2nd Div. Rev. Stat. 1879; re-en. Sec. 152, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2605, C. Civ. Proc. 1895; re-en. Sec. 7527, Rev. C. 1907; re-en. Sec. 10175, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1495; re-en. Sec. 10175, R.C.M. 1935; amd. Sec. 9, Ch. 263, L. 1975; R.C.M. 1947, 91-2706.**

**72-12-802. Time limitations — effect of vacancy in administration.** The time during which there shall be a vacancy in the administration must not be included in any limitations herein prescribed.

**History: En. Sec. 158, p. 279, L. 1877; re-en. Sec. 158, 2nd Div. Rev. Stat. 1879; re-en. Sec. 158, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2611, C. Civ. Proc. 1895; re-en. Sec. 7533, Rev. C. 1907; re-en. Sec. 10182, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1501; re-en. Sec. 10182, R.C.M. 1935; R.C.M. 1947, 91-2713.**

**72-12-803. Payment of debt to stop further accrual of interest.** If there be any debt of the decedent bearing interest, whether presented or not, the personal representative may pay the amount then accumulated and unpaid, or any part thereof, at any time when there are sufficient funds properly applicable thereto, whether said claim be then due or not; and interest shall thereupon cease to accrue upon the amount so paid.

**History: En. Sec. 170, p. 283, L. 1877; re-en. Sec. 170, 2nd Div. Rev. Stat. 1879; re-en. Sec. 170, 2nd Div. Comp. Stat. 1887; amd. Sec. 2623, C. Civ. Proc. 1895; re-en. Sec. 7545, Rev. C. 1907; re-en. Sec. 10194, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1513; re-en. Sec. 10194, R.C.M. 1935; amd. Sec. 10, Ch. 263, L. 1975; R.C.M. 1947, 91-2725.**

## Part 9

## Special Provisions Relating to Distribution

**72-12-901. Testamentary gift or discharge of debt to be treated as specific bequest.** The discharge or bequest in a will of any debt or demand of the testator against the executor named or any other person is not valid against the creditors of the decedent but is a specific bequest of the debt or demand. It must be included in the inventory and, if necessary, applied in the payment of the debts. If not necessary for that purpose, it must be paid in the same manner and proportion as other specific legacies.

**History: En. Sec. 123, p. 268, L. 1877; re-en. Sec. 123, 2nd Div. Rev. Stat. 1879; re-en. Sec. 123, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2555, C. Civ. Proc. 1895; re-en. Sec. 7498, Rev. C. 1907; re-en. Sec. 10134, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1448; re-en. Sec. 10134, R.C.M. 1935; R.C.M. 1947, 91-2206.**

## Part 10

## Closing Estates — Accounting

**72-12-1001. Executor or administrator chargeable in account with whole estate.** Every executor and administrator is chargeable in his account with the whole of the estate of the decedent which may come into his possession at the value of the appraisement contained in the inventory, except as provided in the following sections, and with all the interest, profit, and income of the estate.

**History: En. Sec. 248, p. 305, L. 1877; re-en. Sec. 248, 2nd Div. Rev. Stat. 1879; re-en. Sec. 248, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2771, C. Civ. Proc. 1895; re-en. Sec. 7628, Rev. C. 1907; re-en. Sec. 10282, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1613; re-en. Sec. 10282, R.C.M. 1935; R.C.M. 1947, 91-3402.**

**72-12-1002. Executor or administrator not to profit or lose from increase or decrease of estate — account for sales.** (1) He shall not make profit by the increase or suffer loss by the decrease or destruction without his fault of any part of the estate.

(2) He must account for the excess when he sells any part of the estate for more than the appraisement, and if any is sold for less than the appraisement, he is not responsible for the loss, if the sale has been justly made.

**History: En. Sec. 249, p. 305, L. 1877; re-en. Sec. 249, 2nd Div. Rev. Stat. 1879; re-en. Sec. 249, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2772, C. Civ. Proc. 1895; re-en. Sec. 7629, Rev. C. 1907; re-en. Sec. 10283, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1614; re-en. Sec. 10283, R.C.M. 1935; R.C.M. 1947, 91-3403.**

**72-12-1003. Nonaccountability for uncollected debts without fault.** No executor or administrator is accountable for any debts due the decedent if it appears that they remain uncollected without his fault.

**History: En. Sec. 250, p. 305, L. 1877; re-en. Sec. 250, 2nd Div. Rev. Stat. 1879; re-en. Sec. 250, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2773, C. Civ. Proc. 1895; re-en. Sec. 7630, Rev. C. 1907; re-en. Sec. 10284, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1615; re-en. Sec. 10284, R.C.M. 1935; R.C.M. 1947, 91-3404.**

**72-12-1004. Payment of claim for less than nominal value — account.** If the personal representative pays any claim for less than its nominal value, he is entitled to charge in his account only the amount he actually paid.

**History: En. Sec. 252, p. 305, L. 1877; re-en. Sec. 252, 2nd Div. Rev. Stat. 1879; re-en. Sec. 252, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2775, C. Civ. Proc. 1895; re-en. Sec. 7632, Rev. C. 1907; re-en. Sec. 10286, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1617; re-en. Sec. 10286, R.C.M. 1935; amd. Sec. 13, Ch. 365, L. 1974; R.C.M. 1947, 91-3406.**

# CHAPTER 13

# PERSONS UNDER DISABILITY SUPPLEMENTARY PROVISIONS

**Part 1 — Actions On Guardian's Bond—Limitations**

Section
72-13-101. Bond to be filed and preserved — action for breach.
72-13-102. Limitation of action on bond.
72-13-103. Limitation of action for recovery of property sold by guardian.

**Part 2 — Joint Guardians**

72-13-201. Joint guardianship authorized.
72-13-202. Allowance of account of joint guardians.
72-13-203. Death of a joint guardian.

**Part 3 — Nonresidents Under Disability**

72-13-301. Guardian of property of nonresident — appointment.

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## Part 1

## Actions On Guardian's Bond — Limitations

**72-13-101. Bond to be filed and preserved — action for breach.** Every bond given by a guardian must be filed and preserved in the office of the clerk of the district court and, in case of a breach of condition thereof, may be prosecuted for the use and benefit of the ward or of any person interested in the estate.

**History: En. Sec. 403, p. 344, L. 1877; re-en. Sec. 403, 2nd Div. Rev. Stat. 1879; re-en. Sec. 403, 2nd Div. Comp. Stat. 1887; re-en. Sec. 3054, C. Civ. Proc. 1895; re-en. Sec. 7811, Rev. C. 1907; re-en. Sec. 10459, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1804; re-en. Sec. 10459, R.C.M. 1935; R.C.M. 1947, 91-5206.**

**72-13-102. Limitation of action on bond.** No action can be maintained against the sureties on any bond given by a guardian unless it be commenced within 3 years from the discharge or removal of the guardian; but if, at the time of such discharge, the person entitled to bring such action is under any legal disability to sue, the action may be commenced at any time within 3 years after such disability is removed.

**History: En. Sec. 404, p. 344, L. 1877; re-en. Sec. 404, 2nd Div. Rev. Stat. 1879; re-en. Sec. 404, 2nd Div. Comp. Stat. 1887; re-en. Sec. 3055, C. Civ. Proc. 1895; re-en. Sec. 7812, Rev. C. 1907; re-en. Sec. 10460, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1805; re-en. Sec. 10460, R.C.M. 1935; R.C.M. 1947, 91-5207.**

**72-13-103. Limitation of action for recovery of property sold by guardian.** No action for the recovery of any estate sold by a guardian can be maintained by the ward or by any person claiming under him unless it is commenced within 3 years next after the termination of the guardianship or, when a legal disability to sue exists by reason of minority or otherwise at the time when the cause of action accrues, within 3 years next after the removal thereof.

**History: En. Sec. 405, p. 344, L. 1877; re-en. Sec. 405, 2nd Div. Rev. Stat. 1879; re-en. Sec. 405, 2nd Div. Comp. Stat. 1887; re-en. Sec. 3056, C. Civ. Proc.**

**1895; re-en. Sec. 7813, Rev. C. 1907; re-en. Sec. 10461, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1806; re-en. Sec. 10461, R.C.M. 1935; R.C.M. 1947, 91-5208.**

## Part 2

### Joint Guardians

**72-13-201. Joint guardianship authorized.** Whenever necessary, the court or judge may appoint more than one guardian of any person subject to guardianship, who must give bond and be governed and liable in all respects as a sole guardian.

**History: En. Sec. 406, p. 344, L. 1877; re-en. Sec. 406, 2nd Div. Rev. Stat. 1879; re-en. Sec. 406, 2nd Div. Comp. Stat. 1887; amd. Sec. 3057, C. Civ. Proc. 1895; re-en. Sec. 7814, Rev. C. 1907; re-en. Sec. 10462, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1807; re-en. Sec. 10462, R.C.M. 1935; R.C.M. 1947, 91-5209.**

**72-13-202. Allowance of account of joint guardians.** When an account is rendered by two or more joint guardians, the court or judge may, in its or his discretion, allow the same upon the oath of any of them.

**History: En. Sec. 374, p. 337, L. 1877; re-en. Sec. 374, 2nd Div. Rev. Stat. 1879; re-en. Sec. 374, 2nd Div. Comp. Stat. 1887; re-en. Sec. 2987, C. Civ. Proc. 1895; re-en. Sec. 7776, Rev. C. 1907; re-en. Sec. 10424, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1775; re-en. Sec. 10424, R.C.M. 1935; R.C.M. 1947, 91-4908.**

**72-13-203. Death of a joint guardian.** On the death of one of two or more joint guardians, the power continues to the survivor until a further appointment is made by the court.

**History: En. Sec. 425, p. 348, L. 1877; re-en. Sec. 425, 2nd Div. Rev. Stat. 1879; re-en. Sec. 425, 2nd Div. Comp. Stat. 1887; re-en. Sec. 346, Civ. C. 1895; re-en. Sec. 3789, Rev. C. 1907; re-en. Sec. 5884, R.C.M. 1921; Cal. Civ. C. Sec. 252; Field Civ. C. Sec. 133; re-en. Sec. 5884, R.C.M. 1935; R.C.M. 1947, 91-4521.**

## Part 3

### Nonresidents Under Disability

**72-13-301. Guardian of property of nonresident — appointment.** A guardian of the property within this state of a person not residing therein, who is a minor or of unsound mind, may be appointed by the district court.

**History: En. Sec. 417, p. 346, L. 1877; re-en. Sec. 417, 2nd Div. Rev. Stat. 1879; re-en. Sec. 417, 2nd Div. Comp. Stat. 1887; re-en. Sec. 338, Civ. C. 1895; re-en. Sec. 3781, Rev. C. 1907; re-en. Sec. 5876, R.C.M. 1921; Field Civ. C. Sec. 125; re-en. Sec. 5876, R.C.M. 1935; R.C.M. 1947, 91-4509.**

# CHAPTER 14

# ESCHEATED ESTATES

### Part 1 — General Provisions

Section
72-14-101. Short title.
72-14-102. When title to escheated property vests in state.

72-14-103. Duty of attorney general — employment of special assistant.

**Part 2 — Procedure for State Acquisition of Escheatable Property**

72-14-201. Discovery to determine existence of escheatable property.
72-14-202. Public administrator to deposit moneys with county treasurer — disbursement for administration — accounts.
72-14-203. Investment of deposited moneys pending proceedings.
72-14-204. Order directing sale of property upon final settlement of estate.
72-14-205. Unsold personal property — how disposed of — auction sale.
72-14-206. Unsold real property — how disposed of — auction sale.
72-14-207. Unclaimed personal property in hands of agent — sale.
72-14-208. Sales by department of revenue — how conducted.
72-14-209. Deposit of all sums escheated — agency fund — deduction of costs.
72-14-210. Agency fund moneys to be held in trust — deposit in public school subfund.

**Part 3 — Actions for Claim of Escheated Property**

72-14-301. Filing of action — service — applicability of other procedural provisions.
72-14-302. Statute of limitations.
72-14-303. Inheritance tax — judgment to determine.

**Part 4 — Fiduciary Deposit in Certain Cases Claims—Escheat**

72-14-401. Fiduciary deposit of money when interested person under disability or similar circumstances — receipt as voucher.
72-14-402. Claim for money deposited in county treasury.
72-14-403. Deposit of unclaimed property in state treasury — escheat.

## Part 1

## General Provisions

**72-14-101. Short title.** Parts 1 through 3 of this chapter are to be known as the "Escheated Property Act", and it provides the exclusive method for vesting title in the state of Montana of all unclaimed property.

**History: En. Sec. 1, Ch. 184, L. 1943; R.C.M. 1947, 91-501.**

**72-14-102. When title to escheated property vests in state.** (1) Whenever the title to any property, either real or personal or mixed, fails for any reason, including want of heirs or next of kin, such title shall vest in the state of Montana immediately upon the death of the owner without an inquest or other proceeding in the nature of office found, and there shall be no presumption that such owner died leaving heirs or next of kin.

(2) In relation to property other than estates, title shall be presumed to have failed whenever the owner, beneficial owner, or person entitled to any such property within this state has been or shall be and remain unknown for a period of 20 successive years, and during such period whenever the whereabouts of such owner, beneficial owner, or persons has been or shall be and remain unknown and during such period whenever any personal property wherever situated has been or shall be and remain unclaimed, then in such event such personal property shall escheat to the state.

**History: En. Sec. 2, Ch. 184, L. 1943; amd. Sec. 1, Ch. 170, L. 1953; amd. Sec. 110, Ch. 147, L. 1963; amd. Sec. 1, Ch. 156, L. 1971; amd. Sec. 67, Ch. 391, L. 1973; R.C.M. 1947, 91-502(part).**

**72-14-103. Duty of attorney general — employment of special assistant.** (1) The attorney general of the state of Montana shall be the legal adviser in connection with all escheated property matters, and it is the duty of the attorney general to institute investigations and conduct inquiries for the discovery of all real and personal property which may have escheated or should escheat to the state and for that purpose has the power to cite any and all persons before any of the district courts of this state to answer investigations and render accounts concerning said property, real or personal, and to examine all books and papers of any and all corporations. When any real or personal property is discovered which should escheat to the state, the attorney general must institute suit in the district court of the county where said property shall be situated for the recovery and to escheat the same to the state and shall take all steps necessary to secure such escheat. The proceedings in all such actions shall be those provided for in parts 1 through 3 of this chapter.

(2) For this purpose the attorney general is authorized and empowered to employ a special assistant and incur necessary expenses subject to appropriation limitations.

**History: Ap. p. Sec. 463, Pol. C. 1895; re-en. Sec. 200, Rev. C. 1907; re-en. Sec. 206, R.C.M. 1921; Cal. Pol. C. Sec. 474; re-en. Sec. 206, R.C.M. 1935; Sec. 82-409, R.C.M. 1947; Ap. p. Sec. 12, Ch. 184, L. 1943; amd. Sec. 1, Ch. 193, L. 1953; amd. Sec. 115, Ch. 147, L. 1963; amd. Sec. 1, Ch. 377, L. 1971; Sec. 91-512, R.C.M. 1947; R.C.M. 1947, 82-409, 91-512.**

## Part 2

## Procedure for State Acquisition of Escheatable Property

**72-14-201. Discovery to determine existence of escheatable property.** In order to ascertain if any person has knowledge of or is in possession of any escheatable property, it shall be lawful for the attorney general or his assistant to obtain discovery on motion in the district court requiring any such person or persons to divulge any information they may have concerning the possession or location of any property subject to escheat or any other information pertinent to the recovery of such property by the state of Montana or which information may lead to the discovery of such escheatable property.

**History: En. Sec. 2, Ch. 184, L. 1943; amd. Sec. 1, Ch. 170, L. 1953; amd. Sec. 110, Ch. 147, L. 1963; amd. Sec. 1, Ch. 156, L. 1971; amd. Sec. 67, Ch. 391, L. 1973; R.C.M. 1947, 91-502(part).**

**72-14-202. Public administrator to deposit moneys with county treasurer — disbursement for administration — accounts.** (1) It is the duty of every public administrator, as soon as he receives the same, to deposit with the county treasurer of the county in which probate proceedings are pending all moneys of the estate, and such moneys may be drawn upon the order of the public administrator, countersigned by a district judge, when required for the purposes of administration.

(2) It is the duty of the county treasurer to receive and safely keep all such moneys and pay them out upon the order of the public administrator, when countersigned by a district judge and not otherwise, and to keep an account with such estate of all moneys received and paid to him; and for the safekeeping and payment of all such moneys, as herein provided, the treasurer and his sureties are liable upon his official bond.

**History: En. Sec. 3, Ch. 184, L. 1943; R.C.M. 1947, 91-503.**

**72-14-203. Investment of deposited moneys pending proceedings.** The moneys thus deposited may, upon order of the court or judge, be invested pending the proceedings in securities of the United States or of this state, when such investment is for the best interests of the estate.

**History: En. Sec. 4, Ch. 184, L. 1943; amd. Sec. 111, Ch. 147, L. 1963; amd. Sec. 2, Ch. 156, L. 1971; amd. Sec. 68, Ch. 391, L. 1973; R.C.M. 1947, 91-504(part).**

**72-14-204. Order directing sale of property upon final settlement of estate.** At the final settlement of any estate, if there be no heirs or other claimants thereof, the district judge shall make an order directing the public administrator to sell all property belonging to the estate and pay the proceeds to the county treasurer, who shall keep an account with such estate of all moneys received and paid to him, and the county treasurer shall forthwith remit all of said money to the department of revenue with a statement as to the estates to which the money belongs. The department shall immediately deliver such money to the state treasurer who shall thereupon deposit such money so received by him in the agency fund of the state of Montana.

**History: En. Sec. 4, Ch. 184, L. 1943; amd. Sec. 111, Ch. 147, L. 1963; amd. Sec. 2, Ch. 156, L. 1971; amd. Sec. 68, Ch. 391, L. 1973; R.C.M. 1947, 91-504(part).**

**72-14-205. Unsold personal property — how disposed of — auction sale.** (1) If the personal property in an estate was not sold by the executor or administrator at the final settlement of the estates as by law provided, then it shall be the duty of such executor or administrator to turn over all of such property to the county treasurer, who in turn shall deliver it to the department of revenue with a statement setting forth the name of the estate to which it belongs, and the department must within 1 year of the receipt of such property cause the same to be sold to the highest bidder at a public auction sale at the department's office in Helena, Montana.

(2) The department shall give notice of such sale by publication in a newspaper published in the city of Helena, Montana, once a week for 2 successive weeks making in all two publications, the last publication to be at least 20 days prior to the date of such sale. Such notice shall give the time and place of such sale and shall contain a list and description of the stocks, bonds, securities, effects, or other personal property to be sold.

(3) All of the expenses of such sale shall be deducted from the proceeds thereof by the department, and the balance of such proceeds shall be delivered by the department to the state treasurer for deposit in the agency fund of the state of Montana.

**History: En. Sec. 5, Ch. 184, L. 1943; amd. Sec. 112, Ch. 147, L. 1963; amd. Sec. 3, Ch. 156, L. 1971; amd. Sec. 69, Ch. 391, L. 1973; R.C.M. 1947, 91-505.**

**72-14-206. Unsold real property — how disposed of — auction sale.** (1) If the real property was not sold by the executor or administrator or public administrator at the final settlement of the estate as by law provided, then it shall be the duty of the executor or administrator or public administrator to make and execute to the state of Montana an executor's or administrator's deed and to deliver the same to the county clerk and recorder of the county wherein such real property is situated, and it shall then become the duty of the county clerk and recorder to file and record said deed, without charge, and after being so recorded the county clerk and recorder shall mail the deed to the department of revenue, which shall make a record thereof and deliver the deed to the board of land commissioners.

(2) Within 1 year after the receipt of such recorded deed, the board shall cause such property to be sold to the highest bidder at public auction sale to be held at

the courthouse in the county where such real property or any part thereof is situated.

(3) The board shall give notice of such sale by publication in a newspaper published in the county wherein such real estate or any part thereof is situated once a week for 2 weeks, making in all two publications, the last publication to be at least 20 days prior to the date of such sale. Such notice shall give the time and place of such sale and contain a description of the real property to be sold.

(4) All expenses of such sale shall be deducted by the board from the proceeds thereof, and the balance of such proceeds shall be turned over to the state treasurer who shall deposit the same in the agency fund of the state of Montana. The board shall provide the department with a statement indicating the sale price, expenses, and net proceeds resulting from each such sale.

**History: En. Sec. 6, Ch. 184, L. 1943; amd. Sec. 113, Ch. 147, L. 1963; amd. Sec. 4, Ch. 156, L. 1971; amd. Sec. 70, Ch. 391, L. 1973; R.C.M. 1947, 91-506.**

**72-14-207. Unclaimed personal property in hands of agent — sale.** Whenever the personal property in an estate remains in the hands of an agent unclaimed for 2 years and it appears to the court or judge that it is for the best interests of the estate and those interested therein, such property shall be sold under the order of the court or judge and the proceeds, after deducting the expense of the sale allowed by the court or judge, must be paid to the department of revenue for deposit into the state treasury, and upon receipt of such proceeds it shall be the duty of the state treasurer to deposit the same in the agency fund of the state of Montana.

**History: En. Sec. 7, Ch. 184, L. 1943; amd. Sec. 114, Ch. 147, L. 1963; amd. Sec. 5, Ch. 156, L. 1971; amd. Sec. 71, Ch. 391, L. 1973; R.C.M. 1947, 91-507.**

**72-14-208. Sales by department of revenue — how conducted.** (1) All hereinbefore mentioned sales by the department of revenue must be at public auction at the department's office.

(2) Said sales must be for cash and shall be made to the highest bidder. However, the department may reject all bids which are disproportionate to the value of the property being sold.

**History: En. Sec. 8, Ch. 184, L. 1943; amd. Sec. 6, Ch. 156, L. 1971; amd. Sec. 72, Ch. 391, L. 1973; R.C.M. 1947, 91-508.**

**72-14-209. Deposit of all sums escheated — agency fund — deduction of costs.** (1) All sums escheated under the provisions of parts 1 through 3 shall be delivered by the department of revenue to the state treasurer and deposited by the treasurer in the agency fund.

(2) In connection with the recovery of money or property from escheats other than those from estates, the department of revenue is hereby authorized and directed to deduct the costs incurred in reducing such moneys or property to the possession of the state of Montana, which sum shall not exceed 5% of the amount so recovered, except for such other costs and fees as the judgment of escheat shall so direct.

**History: En. Sec. 2, Ch. 184, L. 1943; amd. Sec. 1, Ch. 170, L. 1953; amd. Sec. 110, Ch. 147, L. 1963; amd. Sec. 1, Ch. 156, L. 1971; amd. Sec. 67, Ch. 391, L. 1973; R.C.M. 1947, 91-502(part).**

**72-14-210. Agency fund moneys to be held in trust — deposit in public school subfund.** Moneys and properties placed in the agency fund shall be held in trust for a period of 10 years prior to deposit in the public school subfund in the trust and legacy fund by the state treasurer; such 10-year period being a time within which the owner, beneficial owner, or any person having a right, title, or interest in the property or money escheated may make claim by the institution of an action for the dissolution of the trust in an amount equal to the full amount or value of the property escheated minus the costs and expenses incident to reducing the same to the possession of the state.

**History: En. Sec. 2, Ch. 184, L. 1943; amd. Sec. 1, Ch. 170, L. 1953; amd. Sec. 110, Ch. 147, L. 1963; amd. Sec. 1, Ch. 156, L. 1971; amd. Sec. 67, Ch. 391, L. 1973; R.C.M. 1947, 91-502(part).**

## Part 3

## Actions for Claim of Escheated Property

**72-14-301. Filing of action — service — applicability of other procedural provisions.** (1) Any persons claiming property in the hands of the state treasurer must bring an action in the district court of Lewis and Clark County, Montana, against the state treasurer.

(2) In such action one copy of the complaint and summons must be served upon the state treasurer, one must be served upon the attorney general, and one must be served upon the director of revenue.

(3) Such action shall be prosecuted subject to all of the provisions of the statutes of this state in relation to civil actions generally, including the right of either party to appeal to the supreme court of the state of Montana.

**History: En. Sec. 9, Ch. 184, L. 1943; amd. Sec. 1, Ch. 79, L. 1945; amd. Sec. 73, Ch. 391, L. 1973; R.C.M. 1947, 91-509(part).**

**72-14-302. Statute of limitations.** Such action must be brought within 2 years from the date on which the money or property is received by the state treasurer, saving, however, to infants and persons of unsound mind or citizens of the United States beyond the limits of the United States, the right to commence their action at any time within the time limited or 2 years after their respective disabilities cease.

**History: En. Sec. 9, Ch. 184, L. 1943; amd. Sec. 1, Ch. 79, L. 1945; amd. Sec. 73, Ch. 391, L. 1973; R.C.M. 1947, 91-509(part).**

**72-14-303. Inheritance tax — judgment to determine.** The judgment of the court in such action shall determine and fix the amount of inheritance tax, if any, which is due from said claimant to the state of Montana upon the money or property claimed, and none of said money or property shall be turned over to said claimant until said inheritance tax is paid. The department of revenue shall issue its interlocutory certificate showing the amount of said inheritance tax due, if any, and shall have the right to file objections and be heard upon the final determination of said tax.

**History: En. Sec. 9, Ch. 184, L. 1943; amd. Sec. 1, Ch. 79, L. 1945; amd. Sec. 73, Ch. 391, L. 1973; R.C.M. 1947, 91-509(part).**

## Part 4

## Fiduciary Deposit in Certain Cases Claims — Escheat

**72-14-401. Fiduciary deposit of money when interested person under disability or similar circumstances — receipt as voucher.** When property in the hands of an administrator, executor, trustee, or other fiduciary is assigned or distributed to any heir, legatee, devisee, creditor, beneficiary, or person interested in any estate or trust who has no agent in this state or who cannot be found or who refuses to accept the same or to give a proper voucher therefor or to a minor or incompetent person who has no legal guardian to receive the same or person authorized to receipt therefor and the same or any part thereof consists of money, the administrator, executor, trustee, or other fiduciary may deposit the money in a special fund in the name of the heir, legatee, devisee, creditor, beneficiary, or person interested with the county treasurer of the county in which the proceedings are pending or in which such property is located, who shall give a receipt for the same and be liable upon his official bond therefor; and said receipt shall be deemed and received by the court or judge thereof as a voucher in favor of the executor, administrator, trustee, or other fiduciary with the same force and effect as if executed by such heir, legatee, devisee, creditor, beneficiary, or person interested.

**History: En. Sec. 1, Ch. 128, L. 1947; R.C.M. 1947, 91-524.**

**72-14-402. Claim for money deposited in county treasury.** When any person appears and claims the money paid into the county treasury, the district court of such county must inquire into such claim and, if satisfied of his right thereto, must make an order to that effect, and upon presentation of the order, the treasurer must draw his warrant on the special fund for the amount to which claimant is entitled.

**History: En. Sec. 2, Ch. 128, L. 1947; R.C.M. 1947, 91-525.**

**72-14-403. Deposit of unclaimed property in state treasury — escheat.** (1) All money or other property distributed in the administration of an estate of a decedent or as the subject of a trust and deposited before or after July 1, 1947, with the county treasurer to the credit of the distributee or beneficiary and any money remaining on deposit to the credit of an estate after final distribution must be delivered into the state treasury for deposit in the agency fund by the county treasurer upon the expiration of 1 year from the day of such deposit.

(2) Money or other property so deposited in the state treasury, if not claimed by the person or persons entitled thereto within 2 years from the date of such deposit by bringing an action as provided in parts 1 through 3, known as the "Escheated Property Act", shall escheat to the state of Montana and be placed in the public school subfund of the trust and legacy fund as provided therein.

**History: En. Sec. 3, Ch. 128, L. 1947; amd. Sec. 117, Ch. 147, L. 1963; R.C.M. 1947, 91-526.**

# CHAPTER 15

## PUBLIC ADMINISTRATOR

### Part 1 — Powers and Duties in Acquisition of Estates

Section

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## Part 1

## Powers and Duties in Acquistion of Estates

**72-15-101. Other provisions to supplement chapter.** When no direction is given in this chapter for the government or guidance of a public administrator in the discharge of his duties or for the administration of an estate in his hands, the provisions of chapters 10 through 16 must govern.

**History: En. Sec. 350, p. 330, L. 1877; re-en. Sec. 350, 2nd Div. Rev. Stat. 1879; re-en. Sec. 350, 2nd Div. Comp. Stat. 1887; re-en. Sec. 4528, Pol. C. 1895; re-en. Sec. 3091, Rev. C. 1907; re-en. Sec. 10008, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1743; re-en. Sec. 10008, R.C.M. 1935; R.C.M. 1947, 91-619.**

**72-15-102. When public administrator to take charge of estate.** (1) Every public administrator duly elected, commissioned, and qualified must take charge of estates of persons dying within his county as follows:

(a) of estates of decedents for which no administrators are appointed and which, in consequence thereof, are being wasted, uncared for, or lost;

(b) of estates of decedents who have no known heirs;

(c) of estates ordered into his hands by the court; and

(d) of estates upon which letters of administration have been issued to him by the court.

(2) However, it shall be unlawful for any public administrator of any county of the state of Montana to file any petition for the issuance to him as such public

administrator of letters of administration of the estate of any decedent until at least 30 days have elapsed from the day of the death of any such decedent, unless it is affirmatively shown and made to appear in and by any such petition for letters of administration that there are no known heirs of such decedent or that all of the known heirs of such decedent reside outside of the state of Montana and that the estate of such decedent consists of property of such a nature that it will be lost, wasted, or depreciated in value unless cared for and administered upon at once.

**History: En. Sec. 333, p. 326, L. 1877; re-en. Sec. 333, 2nd Div. Rev. Stat. 1879; re-en. Sec. 333, 2nd Div. Comp. Stat. 1887; re-en. Sec. 4510, Pol. C. 1895; re-en. Sec. 3073, Rev. C. 1907; re-en. Sec. 9990, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1726; re-en. Sec. 9990, R.C.M. 1935; amd. Sec. 1, Ch. 77, L. 1941; R.C.M. 1947, 91-601.**

**72-15-103. Requirement to procure letters of administration — bond and oath.** (1) Whenever a public administrator takes charge of an estate under order of the court, he must with all convenient dispatch procure letters of administration thereon, in like manner and on like proceedings as letters of administration are issued to other persons.

(2) His official bond and oath are in lieu of a personal representative's bond and oath, but when real estate is ordered to be sold, another bond may be required by the court.

**History: En. Sec. 334, p. 326, L. 1877; re-en. Sec. 334, 2nd Div. Rev. Stat. 1879; re-en. Sec. 334, 2nd Div. Comp. Stat. 1887; re-en. Sec. 4511, Pol. C. 1895; re-en. Sec. 3074, Rev. C. 1907; re-en. Sec. 9991, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1727; re-en. Sec. 9991, R.C.M. 1935; amd. Sec. 4, Ch. 263, L. 1975; R.C.M. 1947, 91-602.**

**72-15-104. Duty to commence actions for recovery of property.** The public administrator must institute all actions and prosecutions necessary to recover the property, debts, papers, or other estate of the decedent.

**History: En. Sec. 339, p. 327, L. 1877; re-en. Sec. 339, 2nd Div. Rev. Stat. 1879; re-en. Sec. 339, 2nd Div. Comp. Stat. 1887; re-en. Sec. 4516, Pol. C. 1895; re-en. Sec. 3079, Rev. C. 1907; re-en. Sec. 9996, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1732; re-en. Sec. 9996, R.C.M. 1935; R.C.M. 1947, 91-607.**

**72-15-105. Duty of persons in whose house stranger dies — notification to public administrator.** Whenever a stranger or person without known heirs dies intestate in the house or premises of another, the possessor of such premises or anyone knowing the facts must give immediate notice thereof to the public administrator of the county; in default of so doing, he is liable for any damage that may be sustained thereby, to be recovered by the public administrator or any person interested.

**History: En. Sec. 335, p. 326, L. 1877; re-en. Sec. 335, 2nd Div. Rev. Stat. 1879; re-en. Sec. 335, 2nd Div. Comp. Stat. 1887; re-en. Sec. 4512, Pol. C. 1895; re-en. Sec. 3075, Rev. C. 1907; re-en. Sec. 9992, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1728; re-en. Sec. 9992, R.C.M. 1935; R.C.M. 1947, 91-603.**

**72-15-106. Civil officers to notify public administrator of property in danger of loss or waste.** All civil officers must inform the public administrator of all property known to them belonging to a decedent which is liable to loss, injury, or waste and which, by reason thereof, ought to be in the possession of the public administrator.

**History: En. Sec. 338, p. 327, L. 1877; re-en. Sec. 338, 2nd Div. Rev. Stat. 1879; re-en. Sec. 338, 2nd Div. Comp. Stat. 1887; re-en. Sec. 4515, Pol. C. 1895;**

**re-en. Sec. 3078, Rev. C. 1907; re-en. Sec. 9995, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1731; re-en. Sec. 9995, R.C.M. 1935; R.C.M. 1947, 91-606.**

**72-15-107. Power to require persons controlling property to furnish statement describing property.** Whenever any person dies in any county of this state and no administrator has been appointed to take charge of his estate, the public administrator of such county, prior to the issuance of letters of administration to him, shall have authority to make a written demand upon any person, firm, bank, or corporation, which he believes holds or has in its possession or control any money, evidence of indebtedness, or other personal property or which owes to such deceased person any money, to furnish to him a written statement, under oath, showing the amount of money or the evidence of indebtedness or personal property of such deceased person held by it fully describing the same and the total sums of money, if any, due from it to such deceased person. Upon receipt of such written demand, the person, firm, bank, or corporation receiving the same shall immediately furnish, under oath, to such public administrator said statement.

**History: En. Sec. 1, Ch. 134, L. 1909; re-en. Sec. 10010, R.C.M. 1921; re-en. Sec. 10010, R.C.M. 1935; R.C.M. 1947, 91-621.**

**72-15-108. Refusal to furnish statement — misdemeanor.** Any person, firm, bank, or corporation or officer, agent, or employee thereof refusing upon demand to furnish the statement as required by 72-15-107 shall be guilty of a misdemeanor.

**History: En. Sec. 2, Ch. 134, L. 1909; re-en. Sec. 10011, R.C.M. 1921; re-en. Sec. 10011, R.C.M. 1935; R.C.M. 1947, 91-622.**

**72-15-109. Order to examine person in possession or charged with misappropriation of estate.** When the public administrator complains to the district court or a judge thereof, on oath, that any person has concealed, committed theft of, or disposed of or has in his possession any money, goods, property, or effects to the possession of which such administrator is entitled in his official capacity, the court or judge may cite such person to appear and may examine him on oath touching the matter of such complaint.

**History: En. Sec. 340, p. 328, L. 1877; re-en. Sec. 340, 2nd Div. Rev. Stat. 1879; re-en. Sec. 340, 2nd Div. Comp. Stat. 1887; re-en. Sec. 4517, Pol. C. 1895; re-en. Sec. 3080, Rev. C. 1907; re-en. Sec. 9997, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1733; re-en. Sec. 9997, R.C.M. 1935; amd. Sec. 65, Ch. 359, L. 1977; R.C.M. 1947, 91-608.**

**72-15-110. Refusal to be examined — civil contempt.** All such interrogatories and answers must be reduced to writing and signed by the party examined and filed in the court. If the person so cited refuses to appear and submit to such examination or to answer such interrogatories as may be put to him touching the matter of such complaint, the court or judge may commit him to the county jail, there to remain in close custody until he submits to the order of the court or judge.

**History: En. Sec. 341, p. 328, L. 1877; re-en. Sec. 341, 2nd Div. Rev. Stat. 1879; re-en. Sec. 341, 2nd Div. Comp. Stat. 1887; re-en. Sec. 4518, Pol. C. 1895; re-en. Sec. 3081, Rev. C. 1907; re-en. Sec. 9998, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1734; re-en. Sec. 9998, R.C.M. 1935; R.C.M. 1947, 91-609.**

## Part 2

## Powers and Duties in Administration

**72-15-201. Duty to make out inventory, administer, and account.** The public administrator must make out and return an inventory of all estates taken into his possession and administer and account for the same according to the provisions of this chapter, subject to the control and directions of the court.

**History: En. Sec. 336, p. 326, L. 1877; re-en. Sec. 336, 2nd Div. Rev. Stat. 1879; re-en. Sec. 336, 2nd Div. Comp. Stat. 1887; re-en. Sec. 4513, Pol. C. 1895; re-en. Sec. 3076, Rev. C. 1907; re-en. Sec. 9993, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1729, re-en. Sec. 9993, R.C.M. 1935; R.C.M. 1947, 91-604.**

**72-15-202. Duty to deliver up estate when letters granted to another.** If at any time letters testamentary or of administration are regularly granted to any other person on the estate of which the public administrator has charge, he must, under order of the court, account for, pay, and deliver to the executor or administrator thus appointed all the money, property, papers, and estate of every kind in his possession or under his control.

**History: En. Sec. 337, p. 327, L. 1877; re-en. Sec. 337, 2nd Div. Rev. Stat. 1879; re-en. Sec. 337, 2nd Div. Comp. Stat. 1887; re-en. Sec. 4514, Pol. C. 1895; re-en. Sec. 3077, Rev. C. 1907; re-en. Sec. 9994, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1730; re-en. Sec. 9994, R.C.M. 1935; R.C.M. 1947, 91-605.**

**72-15-203. Power of court to order account and delivery of estate at any time.** The court or judge may, at any time, order the public administrator to account for and deliver all the money of an estate in his hands to the heirs or to the executors or administrators regularly appointed.

**History: En. Sec. 342, p. 328, L. 1877; re-en. Sec. 342, 2nd Div. Rev. Stat. 1879; re-en. Sec. 342, 2nd Div. Comp. Stat. 1887; re-en. Sec. 4519, Pol. C. 1895; re-en. Sec. 3082, Rev. C. 1907; re-en. Sec. 9999, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1735; re-en. Sec. 9999, R.C.M. 1935; R.C.M. 1947, 91-610.**

**72-15-204. Duty to keep register.** It is the duty of the public administrator to keep a book to be labeled "Register of Public Administrator" in which he must enter:

(1) the name of every deceased person on whose estate he administers;
(2) the date of granting letters;
(3) money received;
(4) the property and its value;
(5) proceeds of all sales of property;
(6) the amount of his fees;
(7) the expenses of administration;
(8) the amount of the estate after all charges and expenses have been paid;
(9) the disposition of the property on distribution;
(10) the date of discharge of administrator; and
(11) such other matters as may be necessary to give a full and complete history of each estate administered by him.

**History: En. Sec. 4529, Pol. C. 1895; re-en. Sec. 3092, Rev. C. 1907; re-en. Sec. 10009, R.C.M. 1921; re-en. Sec. 10009, R.C.M. 1935; R.C.M. 1947, 91-620.**

**72-15-205. Deposit of moneys with county treasurer — withdrawals for administrative costs — investment.** (1) It is the duty of every public administrator, as soon as he receives the same, to deposit with the county treasurer of the county in which probate proceedings are pending all moneys of the estate, and such moneys may be drawn upon the order of the personal representative, countersigned by a district judge, when required for the purposes of administration.

(2) It is the duty of the county treasurer to receive and safely keep all such moneys and pay them out upon the order of the personal representative, when

countersigned by a district judge and not otherwise, and to keep an account with such estate of all moneys received and paid to him; and for the safekeeping and payment of all such moneys, as herein provided, the treasurer and his sureties are liable upon his official bond.

(3) The moneys thus deposited may, upon order of the court or judge, be invested pending the proceedings in securities of the United States or of this state when such investment is for the best interests of the estate.

**History: En. Sec. 344, p. 329, L. 1877; re-en. Sec. 344, 2nd Div. Rev. Stat. 1879; re-en. Sec. 344, 2nd Div. Comp. Stat. 1887; re-en. Sec. 4521, Pol. C. 1895; re-en. Sec. 3084, Rev. C. 1907; re-en. Sec. 10001, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1737; amd. Sec. 1, Ch. 119, L. 1929; amd. Sec. 1, Ch. 76, L. 1931; re-en. Sec. 10001, R.C.M. 1935; amd. Sec. 14, Ch. 365, L. 1974; R.C.M. 1947, 91-612(part).**

**72-15-206. Monthly settlement of accounts.** The public administrator is required to account and to settle and adjust his accounts, relating to the care and disbursement of money or property belonging to estates in his hands, with the clerk of the district court on the first Monday of each month, and he must pay to the county treasurer any money remaining in his hands of an estate unclaimed.

**History: En. Sec. 346, p. 329, L. 1877; re-en. Sec. 346, 2nd Div. Rev. Stat. 1879; re-en. Sec. 346, 2nd Div. Comp. Stat. 1887; re-en. Sec. 4523, Pol. C. 1895; re-en. Sec. 3086, Rev. C. 1907; re-en. Sec. 10003, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1739; re-en. Sec. 10003, R.C.M. 1935; amd. Sec. 5, Ch. 263, L. 1975; R.C.M. 1947, 91-614.**

**72-15-207. Annual account of condition of all estates.** (1) The public administrator must once each year make to the district court or a judge thereof, under oath, a return of all estates of decedents which have come into his hands stating:

(a) the value of the same;
(b) the money which has come into his hands from each estate;
(c) what he has done with it;
(d) the amount of his fees and expenses incurred;
(e) the balance, if any, remaining in his hands.

(2) He must post a copy of the same in the office of the clerk of the district court of the county.

**History: En. Sec. 343, p. 329, L. 1877; re-en. Sec. 343, 2nd Div. Rev. Stat. 1879; re-en. Sec. 343, 2nd Div. Comp. Stat. 1887; re-en. Sec. 4520, Pol. C. 1895; re-en. Sec. 3083, Rev. C. 1907; re-en. Sec. 10000, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1736; re-en. Sec. 10000, R.C.M. 1935; amd. Sec. 1, Ch. 116, L. 1939; R.C.M. 1947, 91-611.**

**72-15-208. Power of court to require additional report or bond.** The court or judge may, at any time, require the public administrator to report the amount of moneys and property of any estate in his hands and may require him at any time to file additional bond or bonds.

**History: En. Sec. 4527, Pol. C. 1895; re-en. Sec. 3090, Rev. C. 1907; re-en. Sec. 10007, R.C.M. 1921; re-en. Sec. 10007, R.C.M. 1935; R.C.M. 1947, 91-618.**

**72-15-209. Power of public administrator to administer oaths.** Public administrators may administer oaths in regard to all matters touching the discharge of their duties or the administration of estates in their hands.

**History: En. Sec. 349, p. 330, L. 1877; re-en. Sec. 349, 2nd Div. Rev. Stat. 1879; re-en. Sec. 349, 2nd Div. Comp. Stat. 1887; re-en. Sec. 4526, Pol. C. 1895; re-en. Sec. 3089, Rev. C. 1907; re-en. Sec. 10006, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1742; re-en. Sec. 10006, R.C.M. 1935; R.C.M. 1947, 91-617.**

**72-15-210. Fees — how paid.** The fees of all officers chargeable to estates in the hands of public administrators must be paid out of the assets thereof, as soon as the same come into his hands.

**History: En. Sec. 348, p. 330, L. 1877; re-en. Sec. 348, 2nd Div. Rev. Stat. 1879; re-en. Sec. 348, 2nd Div. Comp. Stat. 1887; re-en. Sec. 4525, Pol. C. 1895; re-en. Sec. 3088, Rev. C. 1907; re-en. Sec. 10005, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1741; re-en. Sec. 10005, R.C.M. 1935; R.C.M. 1947, 91-616.**

**72-15-211. Conflict of interest prohibited — affidavit.** The public administrator must not be interested in the expenditures of any kind made on account of any estate he administers; nor must he be associated, in business or otherwise, with anyone who is so interested; and he must attach to his report and publication, made in accordance with 72-15-207, his affidavit to that effect.

**History: En. Sec. 345, p. 329, L. 1877; re-en. Sec. 345, 2nd Div. Rev. Stat. 1879; re-en. Sec. 345, 2nd Div. Comp. Stat. 1887; re-en. Sec. 4522, Pol. C. 1895; re-en. Sec. 3085, Rev. C. 1907; re-en. Sec. 10002, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1738; re-en. Sec. 10002, R.C.M. 1935; R.C.M. 1947, 91-613.**

**72-15-212. Final settlement of estate — sale of property — escheat.** At the final settlement of any estate, if there be no heirs or other claimants thereof, the district judge shall make an order directing the administrator to sell all property belonging to the estate and pay the proceeds to the county treasurer, who shall credit the same and all other moneys belonging to said estate to the escheated estates fund, and the county treasurer shall forthwith remit all of said money to the department of revenue with a statement as to the estates to which the money belongs, which remittance shall be treated as provided in chapter 14, as amended.

**History: En. Sec. 344, p. 329, L. 1877; re-en. Sec. 344, 2nd Div. Rev. Stat. 1879; re-en. Sec. 344, 2nd Div. Comp. Stat. 1887; re-en. Sec. 4521, Pol. C. 1895; re-en. Sec. 3084, Rev. C. 1907; re-en. Sec. 10001, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1737; amd. Sec. 1, Ch. 119, L. 1929; amd. Sec. 1, Ch. 76, L. 1931; re-en. Sec. 10001, R.C.M. 1935; amd. Sec. 14, Ch. 365, L. 1974; R.C.M. 1947, 91-612(part).**

**72-15-213. Wrongful failure of public administrator to deposit moneys — action on bond.** When it appears from the returns made in pursuance of the foregoing sections that any money remains in the hands of the public administrator after final settlement of the estate unclaimed which should be paid over to the county treasurer, the court or judge must order the same paid over to the county treasurer; and on failure of the public administrator to comply with the order within 10 days after the same is made, the county attorney must immediately institute the requisite proceedings against the public administrator for a judgment against him and the sureties on his official bond, in the amount of the money so withheld and costs.

**History: En. Sec. 347, p. 330, L. 1877; re-en. Sec. 347, 2nd Div. Rev. Stat. 1879; re-en. Sec. 347, 2nd Div. Comp. Stat. 1887; re-en. Sec. 4524, Pol. C. 1895; re-en. Sec. 3087, Rev. C. 1907; re-en. Sec. 10004, R.C.M. 1921; Cal. C. Civ. Proc. Sec. 1740; re-en. Sec. 10004, R.C.M. 1935; R.C.M. 1947, 91-615.**

## Part 3

## Compensation — Termination of Office

**72-15-301. Compensation of public administrator.** The public administrator shall receive and collect for his own use as full compensation for his services, including attorney's fees, the amounts provided for in 72-3-631 and 72-3-633; provided, that in no case shall the compensation be less than $25.

**History: Ap. p. Sec. 8, Ch. 134, L. 1909; re-en. Sec. 10017, R.C.M. 1921; re-en. Sec. 10017, R.C.M. 1935; amd. Sec. 1, Ch. 3, L. 1969; amd. Sec. 6, Ch. 263, L. 1975; Sec. 91-628, R.C.M. 1947; Ap. p. Sec. 4641, Pol. C. 1895; re-en. Sec. 3174, Rev. C. 1907; re-en. Sec. 4923, R.C.M. 1921; re-en. Sec. 4923, R.C.M. 1935; amd. Sec. 2, Ch. 263, L. 1975; Sec. 25-237, R.C.M. 1947; R.C.M. 1947, 25-237, 91-628.**

**72-15-302. Retiring public administrator may close pending estates.** The public administrator, upon the expiration or termination of his term of office, may continue to administer estates not closed by filing and presenting to the court a full and complete account pertaining to each estate not closed and securing an order of court granting him letters of administration and qualifying himself as a personal representative.

**History: En. Sec. 1, Ch. 4, L. 1941; amd. Sec. 7, Ch. 263, L. 1975; R.C.M. 1947, 91-629.**

**72-15-303. Accounting and surrender of pending estates on retirement of public administrator.** Should said public administrator, upon the expiration or termination of his office and within 60 days thereafter, fail to qualify as general administrator of estates not yet closed, he shall, upon demand of his successor to such office or voluntarily if he desires to be relieved from further performance of the trust, surrender to said successor all estates not closed and property belonging to such estates, having first filed and presented to the court for approval a full and complete account pertaining to such estate not closed.

**History: En. Sec. 2, Ch. 4, L. 1941; R.C.M. 1947, 91-630.**

**72-15-304. Adjustment of compensation.** The court shall determine and allow such predecessor in office for his services rendered in connection with estates not closed a compensation based upon the commission prescribed and allowed by law in proportion to the services necessarily rendered and those necessary to be rendered by such successor in closing up such estates. Such successor shall thereupon be allowed and paid the balance of such commission allowed.

**History: En. Sec. 3, Ch. 4, L. 1941; amd. Sec. 8, Ch. 263, L. 1975; R.C.M. 1947, 91-631.**

# CHAPTER 16

## INHERITANCE AND ESTATE TAXES

### Part 1 — General Provisions

Section

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72-16-211. Public administrator — duty to investigate concerning tax — compensation generally.
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## Part 1

## General Provisions

**72-16-101. Definitions.** In parts 1 through 8, the following definitions apply:

(1) The words "estate" and "property" shall be taken to mean the real and personal property or interest therein passing or transferred to individual legatees, devisees, heirs, next of kin, grantees, donees, or vendees and not as the property or interest therein of the decedent, grantor, donor, or vendor and shall include all personal property within or without the state.

(2) The word "transfer" shall be taken to include the passing of property or any interest therein, in possession or enjoyment, present or future, by inheritance, descent, devise, succession, bequest, grant, deed, bargain, sale, gift, or appointment in the manner herein prescribed to each individual or corporation.

(3) The word "decedent" shall include the testator, intestate, grantor, bargainor, vendor, or donor.

(4) "Intangible" or "intangible property", when used without other qualifications, shall be taken to include all moneys, stocks, bonds, notes, securities, and credits of all kinds, secured or unsecured.

(5) The words "county treasurer", "public administrator", and "county attorney" shall be taken to mean the treasurer, public administrator, and county attorney of the county in which the district court has jurisdiction of the proceedings.

(6) The terms "joint" and "jointly" refer to ownership of property by two or more persons having as one of the incidents of such ownership the right of survivorship in the surviving owner or owners upon the death of one of the owners. This definition does not affect the concept of property owned as tenants in common, and this type of ownership shall continue to be recognized where applicable.

**History: En. Sec. 22, Ch. 65, L. 1923; re-en. Sec. 10400.43, R.C.M. 1935; amd. Sec. 7, Ch. 490, L. 1977; R.C.M. 1947, 91-4453.**

**72-16-102. Jurisdiction.** (1) The district court of every county of the state having jurisdiction to grant letters testamentary or of administration upon the estate of a decedent whose property is chargeable with any tax under the inheritance tax laws or to appoint a trustee of such estate or any part thereof or to give ancillary letters thereon shall have jurisdiction to hear and determine all questions arising under the provisions of the inheritance tax laws and to do any act in relation thereto authorized by law to be done by a district court in other matters or proceedings coming within its jurisdiction.

(2) If two or more district courts shall be entitled to exercise any such jurisdiction, the district court first acquiring jurisdiction hereunder shall retain the same to the exclusion of every other district court.

**History: En. Sec. 12, Ch. 65, L. 1923; amd. Sec. 3, Ch. 150, L. 1925; re-en. Sec. 10400.13, R.C.M. 1935; amd. Sec. 1, Ch. 79, L. 1951; amd. Sec. 81, Ch. 391, L. 1973; amd. Sec. 6, Ch. 365, L. 1974; R.C.M. 1947, 91-4423.**

## Part 2

## Powers and Duties of State Officers and Agencies

**72-16-201. Powers of department generally — duty to supervise administration of tax laws — reports.** (1) The department of revenue in the conduct of inheritance tax affairs shall have the same and similar powers and authority for gathering information and making investigations as is conferred by law on the department in the performance of its other duties.

(2) It shall be the duty of the department to supervise the administration of and to investigate and cause to be investigated the administration of the inheritance tax laws and such particular estates to which the inheritance tax laws apply throughout the various counties of the state and to cause to be made and filed in its office reports of such investigation, together with specific information and facts as to particular estates that may seem to require special consideration and attention by the legal department of the state; but no information so acquired shall, in advance of legal action, be disclosed to anyone except proper officials and persons interested in such estate.

**History: En. Sec. 18, Ch. 65, L. 1923; amd. Sec. 6, Ch. 150, L. 1925; re-en. Secs. 10400.34, 10400.35, R.C.M. 1935; amd. Secs. 95, 96, Ch. 391, L. 1973; R.C.M. 1947, 91-4444, 91-4445(part).**

**72-16-202. Report to governor and legislature.** The department of revenue shall biennially report to the governor and to the legislature at the opening of the sessions the general result of its labors and investigations in inheritance tax matters during the previous biennial period, together with specific reports of the several counties where the administration of the inheritance tax laws has been lax and unsatisfactory, with such recommendations for action thereon by the legislature as may be deemed advisable and proper.

**History: En. Sec. 18, Ch. 65, L. 1923; amd. Sec. 6, Ch. 150, L. 1925; re-en. Sec. 10400.35, R.C.M. 1935; amd. Sec. 96, Ch. 391, L. 1973; R.C.M. 1947, 91-4445(part).**

**72-16-203. Employment of assistants by department.** The department of revenue may employ such other persons as experts and assistants as may be necessary to perform the duties that may be required of the department and fix their compensation.

**History: En. Sec. 24, Ch. 65, L. 1923; re-en. Sec. 10400.45, R.C.M. 1935; amd. Sec. 103, Ch. 391, L. 1973; R.C.M. 1947, 91-4454.**

**72-16-204. Subpoena and discovery powers — contempt.** (1) Oaths to witnesses in any matter under the investigation or consideration of the department of revenue may be administered by the director of revenue or his appointed agents.

(2) In case any witness shall fail to obey any summons to appear before the department or shall refuse to testify or answer any material questions or to produce records, books, papers, or documents, when required to do so, such failure or refusal shall be reported to the attorney general, who shall thereupon institute proceedings in the proper district court to compel obedience to any summons or order of the department or to punish witnesses for any such neglect or refusal.

**History: En. Sec. 25, Ch. 65, L. 1923; re-en. Sec. 10400.46, R.C.M. 1935; amd. Sec. 104, Ch. 391, L. 1973; R.C.M. 1947, 91-4455(part).**

**72-16-205. Compensation of witnesses and officers serving subpoenas.** In the discretion of the department of revenue, officers who serve summons or subpoenas and witnesses attending shall receive like compensation as officers and witnesses in the district court.

**History: En. Sec. 25, Ch. 65, L. 1923; re-en. Sec. 10400.46, R.C.M. 1935; amd. Sec. 104, Ch. 391, L. 1973; R.C.M. 1947, 91-4455(part).**

**72-16-206. Perjury.** Any person who shall testify falsely in any material manner under the consideration of the department of revenue shall be guilty of and punished for perjury.

**History: En. Sec. 25, Ch. 65, L. 1923; re-en. Sec. 10400.46, R.C.M. 1935; amd. Sec. 104, Ch. 391, L. 1973; R.C.M. 1947, 91-4455(part).**

**72-16-207. Forms and blanks — department to furnish.** The department of revenue shall prescribe such forms and prepare such blanks as may be necessary in inheritance tax proceedings, and such blanks shall be printed at the expense of the state and furnished to each district court or the clerk thereof upon the request of the judge or clerk thereof.

**History: En. Sec. 18, Ch. 65, L. 1923; amd. Sec. 6, Ch. 150, L. 1925; re-en. Sec. 10400.38, R.C.M. 1935; amd. Sec. 99, Ch. 391, L. 1973; amd. Sec. 10, Ch. 365, L. 1974; R.C.M. 1947, 91-4448.**

**72-16-208. Powers and duties of department as to nonresident estates.** The department of revenue shall also gather information and make investigations and reports concerning the estates of nonresident decedents within the provisions of the inheritance tax laws and shall especially investigate the probate and other records for such probable estates without the state and report thereon from time to time to the legal department of the state and to the proper district court for appropriate legal action, but no information so acquired shall, in advance of legal action, be disclosed to anyone except proper officials and persons interested in such estate.

**History: En. Sec. 18, Ch. 65, L. 1923; amd. Sec. 6, Ch. 150, L. 1925; re-en. Sec. 10400.36, R.C.M. 1935; amd. Sec. 97, Ch. 391, L. 1973; R.C.M. 1947, 91-4446.**

**72-16-209. Power of composition and compromise in certain cases.** (1) The department of revenue is authorized to enter into an agreement with the executor, administrator, or trustee of any estate in which remainders or expectant estates have been of such a nature or so disposed and circumstanced that the taxes therein were held not presently payable or where the interests of the legatees or devisees are not ascertainable under the provisions of parts 1 through 8 or whenever a tax is claimed on account of the transfer of any property of a nonresident decedent and to compound such taxes upon such terms as may be deemed equitable and expedient and to grant discharges to said executors, administrators, or trustees upon the payment of the taxes provided for in such composition. However, no such composition shall be conclusive in favor of such executors, administrators, or trustees as against the interests of such cestui que trust as may possess either present rights of enjoyment or fixed, absolute, or indefeasible rights of future enjoyment or of such as would possess such rights in the event of the immediate termination of particular estates, unless they consent thereto either personally when competent or by guardian.

(2) Composition or settlement made or effected under the provisions of this section shall be executed in triplicate, and one copy shall be filed in the office of the clerk of the district court of the county in which the tax was paid; one copy to be delivered to the executors, administrators, or trustees, who shall be parties thereto, and one copy to be retained by the department of revenue.

(3) In every estate in which the amount of inheritance tax collectible shall exceed or probably exceed the sum of $1,000, there shall be no compounding, composition, or settlement of the taxes under the authority conferred by this section or otherwise, until the department of revenue shall have investigated such estate and made a report thereon or until the department consents to such compounding, compromise, or settlement.

**History: (1), (2)En. Sec. 20, Ch. 65, L. 1923; re-en. Sec. 10400.41, R.C.M. 1935; amd. Sec. 102, Ch. 391, L. 1973; Sec. 91-4451, R.C.M. 1947; (3)En. Sec. 18, Ch. 65, L. 1923; amd. Sec. 6, Ch. 150, L. 1925; re-en. Sec. 10400.37, R.C.M. 1935; amd. Sec. 98, Ch. 391, L. 1973; Sec. 91-4447, R.C.M. 1947; R.C.M. 1947, 91-4447(part), 91-4451.**

**72-16-210. Duty of attorney general.** It shall be the duty of the legal department of the state to carry out and enforce the recommendations and directions of the department of revenue in all matters pertaining to the conduct of inheritance tax affairs.

**History: En. Sec. 18, Ch. 65, L. 1923; amd. Sec. 6, Ch. 150, L. 1925; re-en. Sec. 10400.37, R.C.M. 1935; amd. Sec. 98, Ch. 391, L. 1973; R.C.M. 1947, 91-4447(part).**

**72-16-211. Public administrator — duty to investigate concerning tax — compensation generally.** (1) It shall be the duty of the public administrator, under the general supervision of the department of revenue and with the assistance of the county attorney, when required by the department or district judge, to investigate the estates of deceased persons within his county and to appear for and act in behalf of the county and state in the district court in such estates as the court may in its discretion deem necessary.

(2) For such services the public administrator shall be entitled to 5% of the gross inheritance tax as determined in each such estate, to be paid by the county treasurer out of the inheritance tax funds upon an order of the district judge, provided that the minimum fee for each such estate shall not be less than $5 and that it shall not exceed $25; but in cases of unusual difficulty in estates of resident decedents where the tax exceeds $500, the district judge may allow the public administrator such additional compensation as he may deem just and reasonable.

**History: En. Sec. 17, Ch. 65, L. 1923; re-en. Sec. 10400.43, R.C.M. 1935; amd. Sec. 94, Ch. 391, L. 1973; R.C.M. 1947, 91-4443.**

**72-16-212. Power of public administrator or other to seek administration when no application made.** When no application for administration of the estate of any deceased person is made within 6 months after the demise of such person and such estate appears to come under the provisions of the inheritance tax laws or when administration has been completed without determining the tax, the public administrator of the proper county or any person interested in such estate may make application for such special or general administration as may be necessary for the purpose of the adjustment and payment of such tax, if any, or if no tax is due, for an order determining that fact.

**History: En. Sec. 17, Ch. 65, L. 1923; re-en. Sec. 10400.31, R.C.M. 1935; R.C.M. 1947, 91-4441(part).**

**72-16-213. Public administrator — duty as to transfer made in contemplation of death without payment of tax.** Where it appears that the estate of a deceased person subject to the inheritance tax laws was transferred in contemplation of the death of the grantor without the adjustment and payment of the inheritance taxes and no application for such adjustment is made within 6 months after the demise of such grantor, the public administrator of the proper county shall notify the department of revenue and on its order make application for and shall be entitled to such general or special administration as may be necessary for the purpose of the adjustment and payment of the inheritance taxes provided by law and shall administer such estate the same as other estates are administered as though such estate had not been transferred by the grantor.

**History: En. Sec. 17, Ch. 65, L. 1923; re-en. Sec. 10400.32, R.C.M. 1935; amd. Sec. 93, Ch. 391, L. 1973; R.C.M. 1947, 91-4442.**

**72-16-214. Public administrator — compensation under special provisions.** In cases arising under 72-16-212 and 72-16-213, the public administrator, if appointed such special administrator, shall be entitled in the discretion of the court to the fees allowed by law to administrators or to other reasonable compensation, unless it be found that no tax is due.

**History: En. Sec. 17, Ch. 65, L. 1923; re-en. Sec. 10400.31, R.C.M. 1935; R.C.M. 1947, 91-4441(part).**

**72-16-215. County treasurer — monthly report — payment of collections to department — interest on unpaid amounts.** On or before the fifth day of each month, each county treasurer shall make a report under oath to the department of revenue listing all payments received by him under the inheritance tax laws during the preceding month and stating for what estate, by whom, and when paid. The form of such report shall be prescribed by the department. He shall at the same time pay the department all the payments received by him under the inheritance tax laws and not previously paid to the department, and for all such payments collected by him and not paid to the department within 5 days from the time herein required, he shall pay interest at the rate of 10% per annum.

**History: En. Sec. 19, Ch. 65, L. 1923; amd. Sec. 7, Ch. 150, L. 1925; re-en. Sec. 10400.40, R.C.M. 1935; amd. Sec. 2, Ch. 36, L. 1971; amd. Sec. 101, Ch. 391, L. 1973; R.C.M. 1947, 91-4450.**

**72-16-216. Clerk of court — duty to furnish copies of filed documents.** It shall be the duty of the clerk of the district court to furnish to the department of revenue copies of such documents filed in connection with probate matters as the department may require.

**History: En. Sec. 18, Ch. 65, L. 1923; amd. Sec. 6, Ch. 150, L. 1925; re-en. Sec. 10400.39, R.C.M. 1935; amd. Sec. 100, Ch. 391, L. 1973; R.C.M. 1947, 91-4449.**

**72-16-217. List of deaths to be made by department of health — copy to county clerk.** The department of health and environmental sciences shall prepare on or before the fifth of January, April, July, and October of each year a list of all deaths, together with the date of such death, reported to it during such period and shall send a copy of such list of deaths to the county clerk of each county in the state.

**History: En. Sec. 2, Ch. 186, L. 1935; re-en. Sec. 10400.50, R.C.M. 1935; R.C.M. 1947, 91-4458.**

**72-16-218. County clerk to check records against list — report to department.** (1) The county clerk, upon the receipt of the list of deaths provided for in 72-16-217, shall immediately check the records of his county to determine whether any of the deceased persons whose names appear upon such list may have made any transfer of property or of property rights within such county during the 3 years preceding the death of such person or whether such deceased person may have been possessed of any property in such county at the time of his death.

(2) If he shall find that any such deceased person may have made any such transfers of property or of property rights or have died possessed of such, he shall immediately transmit such information to the department of revenue.

**History: En. Sec. 3, Ch. 186, L. 1935; re-en. Sec. 10400.51, R.C.M. 1935; amd. Sec. 105, Ch. 391, L. 1973; R.C.M. 1947, 91-4459.**

## Part 3

## Application and Imposition of Tax — Exemptions and Rates

**72-16-301. Taxable transfers generally — contemplation of death.** A tax shall be and is hereby imposed upon any transfer of property, real, personal, or mixed or any interest therein or income therefrom in trust or otherwise to any person, association, or corporation in the following cases, except as hereinafter provided:

(1) when the transfer is by will or by intestate laws of this state from any person dying possessed of the property while a resident of the state;

(2) when a transfer is by will or intestate law of property within the state or within its jurisdiction and the decedent was a nonresident of the state at the time of his death;

(3) when the transfer is of property made by a resident or by a nonresident when such nonresident's property is within the state or within its jurisdiction by deed, grant, bargain, sale, or gift made in contemplation of the death of the grantor, vendor, or donor or intended to take effect in possession or enjoyment at or after such death. Every transfer by deed, grant, bargain, sale, or gift made within 3 years prior to the death of the grantor, vendor, or donor of a material part of his estate or in the nature of a final disposition or distribution thereof and without a fair consideration in money or money's worth shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this section, but no such transfer by deed, grant, bargain, sale, or gift made before such 3-year period shall be treated as having been made in contemplation of death. However, nothing herein contained shall be deemed to have modified, amended, or repealed the provisions of 72-16-306.

**History: Ap. p. Sec. 1, Ch. 65, L. 1923; amd. Sec. 1, Ch. 150, L. 1925; amd. Sec. 1, Ch. 105, L. 1927; amd. Sec. 1, Ch. 186, L. 1935; re-en. Sec. 10400.1, R.C.M. 1935; Sec. 91-4401, R.C.M. 1947; (3)En. Sec. 1, Ch. 65, L. 1923; amd. Sec. 1, Ch. 150, L. 1925; amd. Sec. 1, Ch. 105, L. 1927; amd. Sec. 1, Ch. 186, L. 1935; re-en.**

**Sec. 10400.1, R.C.M. 1935; amd. Sec. 1, Ch. 269, L. 1955; Sec. 91-4402, R.C.M. 1947; R.C.M. 1947, 91-4401(part), 91-4402.**

**72-16-302. Transfer under power of appointment.** Whenever any person or corporation shall exercise a power of appointment derived from any disposition of property made either before or after March 5, 1923, such appointment when made shall be deemed a transfer taxable under the provisions of parts 1 through 8, in the same manner as though the property to which such appointment relates belonged absolutely to the donee of such power and had been bequeathed or devised by such donee by will. Whenever any person or corporation possessing such a power of appointment so derived shall omit or fail to exercise the same within the time provided therefor, in whole or in part, a transfer taxable under the provisions of parts 1 through 8 shall be deemed to take place to the extent of such omission or failure, in the same manner as though the persons or corporations thereby becoming entitled to the possession or enjoyment of the property to which such power related had succeeded thereto by a will of the donee of the power failing to exercise such power, taking effect at the time of such omission or failure.

**History: En. Sec. 1, Ch. 65, L. 1923; amd. Sec. 1, Ch. 150, L. 1925; amd. Sec. 1, Ch. 105, L. 1927; amd. Sec. 1, Ch. 186, L. 1935; re-en. Sec. 10400.1, R.C.M. 1935; R.C.M. 1947, 91-4404.**

**72-16-303. Joint estates — transfer by right of survivorship taxable.** (1) Whenever any property, however acquired, real or personal, tangible or intangible, including government bonds of the United States, is inscribed in co-ownership form, held by two or more persons in joint tenancy or as tenants by the entirety, or is deposited in any bank or other depositary in the joint names of two or more persons and payable to the survivor or survivors of them upon the death of one of them, the right of the survivor or survivors to the immediate possession or ownership is a taxable transfer.

(2) The tax is upon the transfer of decedent's interest, one-half or other proper fraction, as evidenced by the written instrument creating the same, as though the property to which the transfer relates belonged to the joint tenants, tenants by the entirety, joint depositors, holders in co-ownership form, or persons, as tenants in common and had been, for inheritance tax purposes, bequeathed or devised to the survivor or survivors by will, except such part thereof as may be shown to have originally belonged to the survivor and never to have belonged to the decedent when the surviving joint tenant is a spouse of the decedent. In all other cases the full value of the property shall be taxable, except such portion thereof that originally belonged to the survivor and as to which the decedent had made no contribution; if the decedent had made a contribution to the ownership of such property, the amount of such contribution shall be taxable.

(3) This section shall not be construed to repeal or modify the provisions of 72-16-301(3).

**History: En. Sec. 1, Ch. 65, L. 1923; amd. Sec. 1, Ch. 150, L. 1925; amd. Sec. 1, Ch. 105, L. 1927; amd. Sec. 1, Ch. 186, L. 1935; re-en. Sec. 10400.1, R.C.M. 1935; amd. Sec. 1, Ch. 181, L. 1951; amd. Sec. 1, Ch. 490, L. 1977; R.C.M. 1947, 91-4405.**

**72-16-304. Insurance proceeds part of estate — exemption.** All insurance payable upon the death of any person over and above $50,000 shall be deemed a part of the property and estate passing to the person or persons entitled to receive the same and, if payable to more than one person, the $50,000 exemption shall be prorated between such persons in proportion to the amount of insurance payable to each.

**History: En. Sec. 1, Ch. 65, L. 1923; amd. Sec. 1, Ch. 150, L. 1925; amd. Sec. 1, Ch. 105, L. 1927; amd. Sec. 1, Ch. 186, L. 1935; re-en. Sec. 10400.1, R.C.M. 1935; R.C.M. 1947, 91-4406.**

**72-16-305. Bequests to executors or trustees — when taxable.** If a testator bequeaths property to one or more executors or trustees in lieu of their commissions or allowances or makes them his legatees to an amount exceeding the commissions or allowances prescribed by law for an executor or trustee, the excess in value of the property so bequeathed, above the amount of commissions or allowances prescribed by law in similar cases, shall be taxable by parts 1 through 8.

**History: En. Sec. 10, Ch. 65, L. 1923; re-en. Sec. 10400.10, R.C.M. 1935; R.C.M. 1947, 91-4420.**

**72-16-306. Recording date prima facie date of transfer — transfers recorded after death.** All transfers of property, real, personal, or mixed, or of any interest therein coming within the provisions of [this section] shall be prima facie proof, for the purposes of [this act] to have been made as of the date upon which the papers evidencing such transfer are recorded, and all such transfers, if recorded after the death of the person or persons making such transfer, whatever the form of such transfer shall be deemed, for the purposes of taxation under the provisions of [this act], to have been made by will.

**History: En. Sec. 1, Ch. 186, L. 1935; re-en. Sec. 10400.1, R.C.M. 1935; R.C.M. 1947, 91-4408.**

**72-16-307. Tax — when imposed.** The tax referred to in 72-16-301 shall be imposed when any person or corporation becomes beneficially entitled, in possession or expectancy, to any property or the income thereof by any such transfer whether made before or after March 5, 1923.

**History: En. Sec. 1, Ch. 65, L. 1923; amd. Sec. 1, Ch. 150, L. 1925; amd. Sec. 1, Ch. 105, L. 1927; amd. Sec. 1, Ch. 186, L. 1935; re-en. Sec. 10400.1, R.C.M. 1935; R.C.M. 1947, 91-4403(part).**

**72-16-308. Tax to be on clear market value — deductions allowed in determining value.** (1) The tax so imposed shall be upon the clear market value of such property passing by any such transfer to each person, institution, association, corporation, or body politic at the rates hereinafter prescribed and only upon the excess of the exemption hereinafter granted to such person, institution, association, corporation, or body politic.

(2) In determining the clear market value of the property so passing by any such transfer, the following deductions and no other shall be allowed:

(a) debts of the decedent owing at the date of death;

(b) expenses of funeral and last illness;

(c) all Montana state, county, municipal, and federal taxes, including all penalties and interest thereon, owing by decedent at the date of death;

(d) the ordinary expenses of administration, including:

(i) the commissions and fees of executors and administrators and their attorneys actually allowed and paid;

(ii) attorneys' fees, filing fees, necessary expenses, and closing costs incident to proceedings to terminate joint tenancies, termination of life estates and transfers in contemplation of death, and any and all other proceedings instituted for the determination of inheritance tax; and

(e) federal estate taxes due or paid.

**History: En. Sec. 1, Ch. 65, L. 1923; amd. Sec. 1, Ch. 150, L. 1925; amd. Sec. 1, Ch. 105, L. 1927; amd. Sec. 1, Ch. 186, L. 1935; re-en. Sec. 10400.1, R.C.M. 1935; amd. Sec. 1, Ch. 5, L. 1957; amd. Sec. 1, Ch. 232, L. 1959; R.C.M. 1947, 91-4407.**

**72-16-309 and 72-16-310 reserved.**

**72-16-311. Exemption — how taken.** The exemption allowed to each person, institution, association, corporation, or body politic shall be taken as provided in 72-16-321.

**History: En. Sec. 4, Ch. 65, L. 1923; re-en. Sec. 10400.4, R.C.M. 1935; amd. Sec. 1, Ch. 105, L. 1953; amd. Sec. 1, Ch. 218, L. 1963; amd. Sec. 1, Ch. 244, L. 1965; amd. Sec. 1, Ch. 343, L. 1969; amd. Sec. 1, Ch. 317, L. 1973; amd. Sec. 1, Ch. 195, L. 1974; amd. Sec. 11, Ch. 263, L. 1975; amd. Sec. 4, Ch. 490, L. 1977; R.C.M. 1947, 91-4414(1).**

**72-16-312. Exemption — transfers for charitable or public purposes.** (1) The following transfers are totally exempt:

(a) all property transferred to the state or any of its institutions or to municipal corporations within the state for strictly county, city, town, or municipal purposes;

(b) all property transferred to any society, corporation, institution, or association, in trust or otherwise, or to any foundation or trust organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, no part of the net earnings of which inures to the benefit of any private stockholder or individual and no substantial part of the activities of which is carrying on propaganda or otherwise attempting to influence legislation, if any of the following conditions is present:

(i) the society, corporation, institution, foundation, trust, or association is organized solely for religious, charitable, scientific, literary, or educational purposes under the laws of this state or of the United States;

(ii) the property transferred is limited for use within this state;

(iii) the society, corporation, institution, foundation, trust, or association is organized or existing under the laws of another state of the United States or of a foreign state or country and at the date of the decedent's death any one of the following conditions existed:

(A) the other state, foreign state, or foreign country did not impose a legacy, succession, or death tax of any character in respect to property transferred to a similar society, corporation, institution, foundation, trust, or association organized or existing under the laws of this state;

(B) the laws of the other state, foreign state, or foreign country contained a reciprocal provision under which property transferred to a similar society, institution, foundation, trust, or association organized or existing under the laws of another state of the United States or foreign state or country was exempt from legacy, succession, or death taxes of every character, if the other state of the United States or foreign state or country allowed a similar exemption in respect to property transferred to a similar society, institution, foundation, trust, or association organized or existing under the laws of another state of the United States or foreign state or country;

(C) the society, corporation, institution, foundation, trust, or association owns or operates a hospital for crippled children within the United States, primarily practicing orthopedics, to which crippled or afflicted children from the state of Montana are without discrimination gratuitously admitted and treated and the property transferred is limited for use at such hospital.

(2) The tax imposed by 72-16-301 does not apply to transfers to the state of Montana or any of its institutions or to county, town, or municipal corporations within the state for strictly county, town, municipal, or other public purposes and corporations of this state organized under its laws or voluntary associations, organized solely for religious, charitable, or educational purposes, which shall use the property so transferred exclusively for the purposes of their organization within the state.

**History: (1)En. Sec. 4, Ch. 65, L. 1923; re-en. Sec. 10400.4, R.C.M. 1935; amd. Sec. 1, Ch. 105, L. 1953; amd. Sec. 1, Ch. 218, L. 1963; amd. Sec. 1, Ch. 244, L. 1965; amd. Sec. 1, Ch. 343, L. 1969; amd. Sec. 1, Ch. 317, L. 1973; amd. Sec. 1, Ch. 195, L. 1974; amd. Sec. 11, Ch. 263, L. 1975; amd. Sec. 4, Ch. 490, L. 1977; Sec. 91-4414, R.C.M. 1947; (2)En. Sec. 1, Ch. 65, L. 1923; amd. Sec. 1, Ch. 150, L. 1925; amd. Sec. 1, Ch. 105, L. 1927; amd. Sec. 1, Ch. 186, L. 1935; re-en. Sec. 10400.1, R.C.M. 1935; Sec. 91-4401, R.C.M. 1947; R.C.M. 1947, 91-4401(part), 91-4414(2).**

**72-16-313. Exemptions of spouse and other relatives.** (1) The clear value of one-half of the property distributed or passing to decedent's surviving spouse is exempt.

(2) The following amounts are exempt:

(a) property of the clear value of $40,000 transferred to the surviving spouse of the decedent;

(b) property of the clear value of $15,000 transferred to:

(i) each minor lineal issue of the decedent;

(ii) any minor child adopted as such in conformity with law;

(iii) any minor child to whom such decedent for not less than 10 years prior to such transfer stood in the mutually acknowledged relation of a parent, provided such relationship began at or before the child's 15th birthday and was continuous for 10 years; or

(iv) any minor lineal issue of such adopted or mutually acknowledged child; and

(c) property of the clear value of $7,000 transferred to each of the lineal issue who have attained majority and to each of the other persons who have attained majority described in 72-16-321(1).

(3) Property of the clear value of $1,000 transferred to each of the persons described in 72-16-321(2) is exempt.

**History: En. Sec. 4, Ch. 65, L. 1923; re-en. Sec. 10400.4, R.C.M. 1935; amd. Sec. 1, Ch. 105, L. 1953; amd. Sec. 1, Ch. 218, L. 1963; amd. Sec. 1, Ch. 244, L. 1965; amd. Sec. 1, Ch. 343, L. 1969; amd. Sec. 1, Ch. 317, L. 1973; amd. Sec. 1, Ch. 195, L. 1974; amd. Sec. 11, Ch. 263, L. 1975; amd. Sec. 4, Ch. 490, L. 1977; R.C.M. 1947, 91-4414(3), (4), (6).**

**72-16-314. Probate code allowances and exemptions not in addition to tax exemptions.** The allowances and exempt property provided for in 72-2-801 through 72-2-803 are to be included in computing the exemptions from inheritance tax provided for in 72-16-313 and are not in addition to such inheritance tax exemptions.

**History: En. 91A-2-405 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-2-405.**

**72-16-315. Discretionary waiver of inheritance tax of surviving spouse.** Notwithstanding any provision of law or statute in conflict herewith, the department of revenue, in its discretion, is authorized to issue a waiver of inheritance tax in the event of the death of any person leaving any real property or personal property, or both, in joint tenancy with a surviving spouse, if the value of the property of the decedent is less than the inheritance exemption allowed by law to the surviving spouse.

**History: En. Sec. 1, Ch. 147, L. 1969; amd. Sec. 76, Ch. 391, L. 1973; R.C.M. 1947, 91-4414.1.**

**72-16-316. Exemption of tangible personal property subject to tax in state of location — reciprocity.** No tax may be imposed upon any tangible personal property of a resident decedent when such property is located without this state and when the transfer of such property is subject to an inheritance or transfer tax in the state where located and the tax has actually been paid, secured, or guaranteed; provided such property is not without this state temporarily or for the sole purpose of deposit or safekeeping and provided the laws of the state where such property is located allow a like exemption in relation to such property left by a resident of that state and located in this state.

**History: En. Sec. 4, Ch. 65, L. 1923; re-en. Sec. 10400.4, R.C.M. 1935; amd. Sec. 1, Ch. 105, L. 1953; amd. Sec. 1, Ch. 218, L. 1963; amd. Sec. 1, Ch. 244, L. 1965; amd. Sec. 1, Ch. 343, L. 1969; amd. Sec. 1, Ch. 317, L. 1973; amd. Sec. 1, Ch. 195, L. 1974; amd. Sec. 11, Ch. 263, L. 1975; amd. Sec. 4, Ch. 490, L. 1977; R.C.M. 1947, 91-4414(7).**

**72-16-317. Credit allowance on inheritance taxes paid to other states.** The tax imposed by this part and part 9 shall, as to a resident of the state of Montana who died domiciled in Montana, be credited with the amount of any valid inheritance, estate, legacy, or succession taxes actually paid to any state or territory of the United States (other than the state of Montana) or to the District of Columbia. However, the amount to be so credited shall in no event exceed that amount which the resident decedent was taxed on that property in Montana.

**History: En. Sec. 1, Ch. 236, L. 1943; R.C.M. 1947, 91-4412.**

**72-16-318. Child's credit for tax paid by decedent's spouse.** Any child of a decedent is entitled to credit for so much of the tax paid by the decedent's spouse as applied to any property which is thereafter transferred by or from such spouse to the child, provided the spouse does not survive the decedent to exceed 10 years.

**History: En. Sec. 4, Ch. 65, L. 1923; re-en. Sec. 10400.4, R.C.M. 1935; amd. Sec. 1, Ch. 105, L. 1953; amd. Sec. 1, Ch. 218, L. 1963; amd. Sec. 1, Ch. 244, L. 1965; amd. Sec. 1, Ch. 343, L. 1969; amd. Sec. 1, Ch. 317, L. 1973; amd. Sec. 1, Ch. 195, L. 1974; amd. Sec. 11, Ch. 263, L. 1975; amd. Sec. 4, Ch. 490, L. 1977; R.C.M. 1947, 91-4414(5).**

**72-16-319 and 72-16-320 reserved.**

**72-16-321. Primary rates — amount remaining after exemptions not in excess of twenty-five thousand dollars.** The exemptions allowed by 72-16-311 through 72-16-316 shall be subtracted from the total value of property or beneficial interests transferred to any person, institution, association, corporation, or political entity by the decedent. A tax is imposed upon the first $25,000 in value of the remaining amount of the total value of property or beneficial interests at the following rates:

(1) at the rate of 2% of the clear value of the interest in property passing to a person if the person entitled to any beneficial interest in such property is:

(a) the husband, wife, lineal issue, or lineal ancestor of the decedent;

(b) any child adopted as such in conformity with law or any child to whom such decedent for not less than 10 years prior to such transfer stood in the mutually acknowledged relation of a parent, provided such relationship began at or before the child's 15th birthday and was continuous for 10 years; or

(c) any lineal issue of such adopted or mutually acknowledged child;

(2) at the rate of 4% of the clear value of the interest in property passing to a person if the person entitled to any beneficial interest in such property is:

(a) the brother or sister or a descendant of a brother or sister of the decedent;

(b) a wife of a son or the husband of a daughter of the decedent;

(3) at the rate of 6% of the clear value of the interest in property passing to a person if the person entitled to any beneficial interest in such property is the uncle, aunt, or first cousin of the decedent;

(4) at the rate of 8% of the clear value of the interest in property passing if the entity entitled to any beneficial interest in such property is:

(a) a person in any other degree of collateral consanguinity than is hereinbefore stated;

(b) a stranger in blood to the decedent; or

(c) a body politic or corporate.

**History: En. Sec. 2, Ch. 65, L. 1923; amd. Sec. 1, Ch. 48, Ex. L. 1933; re-en. Sec. 10400.2, R.C.M. 1935; amd. Sec. 2, Ch. 490, L. 1977; R.C.M. 1947, 91-4409.**

**72-16-322. Other rates — amount remaining after exemptions in excess of twenty-five thousand dollars.** The rates in 72-16-321 are for convenience termed the primary rates. When the amount of the clear value of the remaining amount of the property or interests exceeds $25,000, the rate of tax upon such excess shall be as follows:

(1) upon all in excess of $25,000 and up to $50,000, two times the primary rate;

(2) upon all in excess of $50,000 and up to $100,000, three times the primary rate;

(3) upon all in excess of $100,000, four times the primary rate.

**History: En. Sec. 3, Ch. 65, L. 1923; amd. Sec. 1, Ch. 141, L. 1927; amd. Sec. 2, Ch. 48, Ex. L. 1933; re-en. Sec. 10400.3, R.C.M. 1935; amd. Sec. 3, Ch. 490, L. 1977; R.C.M. 1947, 91-4410.**

## Part 4

## Determination and Payment of Tax

**72-16-401. Application for determination of tax by department — information, documents to be furnished to department.** (1) The personal representative or, should the personal representative fail to do so, any interested person shall make application to the department of revenue for determination of any tax due upon the estate of a decedent.

(2) The applicant shall furnish to the department the inventory and appraisement required by 72-3-607 and any supplemental inventory under 72-3-609, together with a statement under oath or affirmation of any property owned by the decedent at the time of his death situated outside of this state and without its jurisdiction. The applicant shall, upon request of the department, furnish the department with the final accounting of such personal representative. If the decedent died testate, the personal representative shall likewise furnish the department with a certified copy of the last will of the decedent. If the decedent died intestate, the personal representative shall provide the department with a sworn statement setting forth the names, ages, and residences of the heirs at law of decedent. In all cases, the personal representative shall set forth the proportion of the entire estate inherited by or devised to each of said persons and the relation, if any, which each devisee, heir, or transferee sustained to the decedent or person from whom the transfer was made.

(3) The information so provided shall not be binding upon the department in case it believes the same to be erroneous or untrue.

**History: En. 91-4468 by Sec. 4, Ch. 365, L. 1974; amd. Sec. 9, Ch. 516, L. 1975; R.C.M. 1947, 91-4468(part).**

**72-16-402. Department to determine tax.** From the information so furnished the department of revenue and such other information as it may be able to obtain with reference thereto, the department shall with reasonable diligence proceed to ascertain and determine the amount of tax, if any, due under the provisions of the inheritance tax laws of the state of Montana, and a copy of such determination shall be mailed to the personal representative and to the clerk of the appropriate district court. If no tax is due, the department shall likewise so inform the clerk of district court and the personal representative.

**History: En. 91-4468 by Sec. 4, Ch. 365, L. 1974; amd. Sec. 9, Ch. 516, L. 1975; R.C.M. 1947, 91-4468(part).**

**72-16-403. Appeal of department's determination — notice — determination by court.** (1) Should the personal representative or any person affected by the determination of inheritance tax feel aggrieved by the department of revenue's determination, he may, within 60 days after the filing of the copy of such determination with the clerk of district court, appeal the determination to the appropriate district court by serving upon the department his objections to such determination and by filing such notice after so serving the same in the office of the clerk of such court.

(2) The court shall set a day for hearing such appeal upon 10 days' notice to all interested parties and at the time and place set shall hear the appeal upon all papers and records which may be properly presented before it and shall as soon as possible thereafter issue its order determining the amount of such inheritance tax, if it finds a tax to be due.

**History: En. 91-4468 by Sec. 4, Ch. 365, L. 1974; amd. Sec. 9, Ch. 516, L. 1975; R.C.M. 1947, 91-4468(part).**

**72-16-404 through 72-16-410 reserved.**

**72-16-411. Special appraiser — appointment.** The district court, upon the application of any interested party, including the department of revenue, shall appoint a competent person as special appraiser to fix the fair market value at the time of the transfer thereof of the property of persons whose estate shall be subject to the payment of any tax imposed by parts 1 through 8.

**History: En. Sec. 13, Ch. 65, L. 1923; amd. Sec. 2, Ch. 141, L. 1927; re-en. Sec. 10400.17, R.C.M. 1935; amd. Sec. 84, Ch. 391, L. 1973; R.C.M. 1947, 91-4427.**

**72-16-412. Powers and duties of appraiser.** (1) Every such appraiser shall forthwith give notice by mail to all persons known to have a claim or interest in the property to be appraised, including the department of revenue, and to such persons as the district court may by order direct of the time and place when he will appraise such property.

(2) He shall, at such time and place, appraise the same at its fair market value, as herein prescribed; and for that purpose the appraiser is authorized to issue subpoenas and to compel the attendance of witnesses before him and to take the evidence of such witnesses under oath concerning such property and the value thereof. He shall make report thereof and of such value in writing to the district court,

together with the depositions of the witnesses examined and such other facts in relation thereto and to the matter as the district court may order or require.

(3) The report of the special appraiser shall be made in triplicate, and not less than 10 days before the hearing thereon one of said triplicates shall be filed in the office of the district court, one to the administrator or the executor, and the other shall be mailed to the department.

**History: (1), (2)En. Sec. 14, Ch. 65, L. 1923; amd. Sec. 4, Ch. 150, L. 1925; re-en. Sec. 10400.18, R.C.M. 1935; amd. Sec. 85, Ch. 391, L. 1973; Sec. 91-4428, R.C.M. 1947; (3)En. Sec. 15, Ch. 65, L. 1923; amd. Sec. 5, Ch. 150, L. 1925; amd. Sec. 3, Ch. 141, L. 1927; re-en. Sec. 10400.19, R.C.M. 1935; amd. Sec. 86, Ch. 391, L. 1973; Sec. 91-4429, R.C.M. 1947; R.C.M. 1947, 91-4428(part), 91-4429(part).**

**72-16-413. Compensation and expenses of appraiser and witnesses.** Every appraiser shall be paid on the certificate of the district court at the rate of not to exceed $10 per day for every day actually and necessarily employed in such appraisal and shall receive his actual and necessary traveling expenses, and witnesses shall be allowed the same fees as are allowed witnesses in civil actions in courts of record and the same shall be paid by the executor, administrator, or trustee of such estate in the same manner as provided for the payment of other administration expenses.

**History: En. Sec. 14, Ch. 65, L. 1923; amd. Sec. 4, Ch. 150, L. 1925; re-en. Sec. 10400.18, R.C.M. 1935; amd. Sec. 85, Ch. 391, L. 1973; R.C.M. 1947, 91-4428(part).**

**72-16-414. Appraisal to be at clear market value at time of death.** Whenever a transfer of property is made upon which there is or in any contingency there may be a tax imposed, such property shall be appraised at its clear market value existing at the date of death of the transferor, which appraisement shall be made as soon thereafter as practicable.

**History: En. Sec. 15, Ch. 65, L. 1923; amd. Sec. 5, Ch. 150, L. 1925; amd. Sec. 3, Ch. 141, L. 1927; re-en. Sec. 10400.22, R.C.M. 1935; amd. Secs. 1 and 2, Ch. 101, L. 1947; R.C.M. 1947, 91-4432(part).**

**72-16-415. Hearing by court.** At the time and place of hearing the administration account, the district court shall examine the report of the special appraiser and from the report and other proofs relating to any such estate shall forthwith determine the cash value of such estate and the amount of tax to which the same is liable; or the district court, without appointing such appraiser, may at the time so fixed hear the evidence and determine the cash value of such estate and the amount of tax to which the same is liable.

**History: En. Sec. 15, Ch. 65, L. 1923; amd. Sec. 5, Ch. 150, L. 1925; amd. Sec. 3, Ch. 141, L. 1927; re-en. Sec. 10400.19, R.C.M. 1935; amd. Sec. 86, Ch. 391, L. 1973; R.C.M. 1947, 91-4429(part).**

**72-16-416. Notice of hearing — application for exclusion to accompany notice.** (1) Notice of such hearing to determine the inheritance tax shall be given in the manner and for the time provided in 72-1-301 to all interested persons and to the department of revenue.

(2) A copy of the application for exclusion of any property to avoid inheritance tax thereon shall be given with notice of hearing thereof, and notice of any such hearing shall be mailed to the department not less than 15 days before such hearing upon notice forms provided by the department and containing such information as it may require.

**History: En. Sec. 15, Ch. 65, L. 1923; amd. Sec. 5, Ch. 150, L. 1925; amd. Sec. 3, Ch. 141, L. 1927; re-en. Sec. 10400.20, R.C.M. 1935; amd. Sec. 1, Ch. 80, L.**

**1949; amd. Sec. 87, Ch. 391, L. 1973; amd. Sec. 7, Ch. 365, L. 1974; R.C.M. 1947, 91-4430.**

**72-16-417. Future, contingent, or limited estates — duty of insurance commissioner — method of valuation.** (1) The commissioner of insurance shall, on application of any district court or of the department of revenue, determine the value of any such future or contingent estates, income, or interests therein limited, contingent, dependent, or determinable upon the life or lives of the person or persons in being, upon the facts contained in the district court's finding and determination and contained in such special appraiser's report, and upon the facts certify the same to the district court or to the department, and his certificate shall be presumptive evidence that the method of computation adopted therein is correct.

(2) The value of every future or limited estate, income, interest, or annuity dependent upon any life or lives in being shall be determined by the rule, method, and standard of mortality and value employed by the commissioner of insurance of the state of Montana in ascertaining the value of policies of life insurance and annuities for the determination of liabilities of life insurance companies, except that the rate of interest for making such computation shall be 5% per annum. The tax so determined shall be construed to be upon the transfer of a proportion of the principal or corpus of the estate equal to the present value of such future or limited estate, income, interest, or annuity and not upon any earnings or income of said property produced after death.

(3) Such tax shall be due and payable forthwith, except as otherwise provided in parts 1 through 8.

**History: (1)En. Sec. 15, Ch. 65, L. 1923; amd. Sec. 5, Ch. 150, L. 1925; amd. Sec. 3, Ch. 141, L. 1927; re-en. Sec. 10400.21, R.C.M. 1935; amd. Sec. 88, Ch. 391, L. 1973; Sec. 91-4431, R.C.M. 1947; (2), (3)En. Sec. 15, Ch. 65, L. 1923; amd. Sec. 5, Ch. 150, L. 1925; amd. Sec. 3, Ch. 141, L. 1927; re-en. Sec. 10400.22, R.C.M. 1935; amd. Secs. 1 and 2, Ch. 101, L. 1947; Sec. 91-4432, R.C.M. 1947; R.C.M. 1947, 91-4431, 91-4432(part).**

**72-16-418. Contingent encumbrances — no allowance for — return if takes effect.** (1) In estimating the value of any estate or interest in property to the beneficial enjoyment or possession whereof there are persons or corporations presently entitled thereto, no allowance shall be made in respect of any contingent encumbrance thereon or in respect of any contingency upon the happening of which the estate or property or some part thereof or interest therein might be abridged, defeated, or diminished.

(2) In the event of such encumbrance taking effect as an actual burden upon the interest of the beneficiary or in the event of the abridgment, defeat, or diminution of such estate or property or interest therein as aforesaid, a return shall be made to the person properly entitled thereto of a proportionate amount of such tax in respect of the amount or value of the encumbrance when taking effect or so much as will reduce the same to the amount which would have been assessed in respect to the actual duration or extent of the estate or interest enjoyed. Such return of tax shall be made in the manner provided in 72-16-439 and 72-16-442.

**History: En. Sec. 15, Ch. 65, L. 1923; amd. Sec. 5, Ch. 150, L. 1925; amd. Sec. 3, Ch. 141, L. 1927; re-en. Sec. 10400.23, R.C.M. 1935; R.C.M. 1947, 91-4433.**

**72-16-419. Tax payable forthwith on contingent estate — lowest rate.** When property is transferred in trust or otherwise and the rights, interests, or estates of the transferees are dependent upon contingencies or conditions whereby they may be wholly or in part created, defeated, extended, or abridged, a tax shall be imposed upon such transfer at the lowest rate which, on the happening of any of the contingencies or conditions, would be possible under the provisions of parts 1 through 8, and such tax so imposed shall be due and payable forthwith out of the property transferred. However, on the happening of any contingency or condition whereby the property or any part thereof is transferred to a person or corporation which under the provisions of parts 1 through 8 is required to pay a tax at a higher rate than the tax imposed, then such transferee shall pay the difference between the tax imposed and the tax at the higher rate, and the amount of such increased tax shall be enforced and collected as provided in parts 1 through 8.

**History: En. Sec. 15, Ch. 65, L. 1923; amd. Sec. 5, Ch. 150, L. 1925; amd. Sec. 3, Ch. 141, L. 1927; re-en. Sec. 10400.25, R.C.M. 1935; R.C.M. 1947, 91-4435.**

**72-16-420. Estate for life or years subject to divesting — how taxed.** Where an estate for life or for years can be divested by the act or omission of the legatee or devisee, it shall be taxed as if there were no possibility of such divesting.

**History: En. Sec. 15, Ch. 65, L. 1923; amd. Sec. 5, Ch. 150, L. 1925; amd. Sec. 3, Ch. 141, L. 1927; re-en. Sec. 10400.26, R.C.M. 1935; R.C.M. 1947, 91-4436(part).**

**72-16-421. Appraisal of contingent or defeasible estate when tax postponed.** Estates in expectancy which are contingent or defeasible and in which proceedings for determination of the tax have not been taken or where the taxation thereof has been held in abeyance shall be appraised at their full undiminished clear value when the person entitled thereto shall come into the beneficial enjoyment or possession thereof without diminution for or on account of any valuation theretofore made of the particular estates for purposes of taxation upon which said estates in expectancy may have been limited.

**History: En. Sec. 15, Ch. 65, L. 1923; amd. Sec. 5, Ch. 150, L. 1925; amd. Sec. 3, Ch. 141, L. 1927; re-en. Sec. 10400.26, R.C.M. 1935; R.C.M. 1947, 91-4436(part).**

**72-16-422. Court order determining tax — contents — form.** (1) When the district court shall be required to make a determination of the value of any estate which is taxable under the inheritance tax laws and of the tax to which it is liable, an order shall be entered by the court determining the same, which order shall include a statement of:

(a) the date of death of the decedent;

(b) the gross value of the real and personal property of such estate, stating the principal items thereof;

(c) the deductions therefrom allowed by the court;

(d) the names and relationship of the persons entitled to receive the same, with the amount received by each;

(e) the rates and amounts of inheritance tax for which each such person is liable and the total amount of tax to be paid;

(f) the amount of interest or penalty due, if any.

(2) Such order shall be substantially in the form prescribed by the department of revenue.

**History: En. Sec. 15, Ch. 65, L. 1923; amd. Sec. 5, Ch. 150, L. 1925; amd. Sec. 3, Ch. 141, L. 1927; re-en. Sec. 10400.27, R.C.M. 1935; amd. Sec. 1, Ch. 161, L. 1971; amd. Sec. 89, Ch. 391, L. 1973; amd. Sec. 8, Ch. 365, L. 1974; R.C.M. 1947, 91-4437(part).**

**72-16-423. Court order to be delivered and taxes paid before final judgment in estate.** A copy of the court order referred to in 72-16-422 shall be delivered or mailed to the county treasurer, the administrator or executor, and the department of revenue, and no final judgment shall be entered in such estates until due proof is filed with the court that such copies have been so delivered or mailed and receipts are filed with such court showing the payment of all such taxes or proof is filed showing that the bond authorized by 72-16-438 has been given.

**History: En. Sec. 15, Ch. 65, L. 1923; amd. Sec. 5, Ch. 150, L. 1925; amd. Sec. 3, Ch. 141, L. 1927; re-en. Sec. 10400.27, R.C.M. 1935; amd. Sec. 1, Ch. 161, L. 1971; amd. Sec. 89, Ch. 391, L. 1973; amd. Sec. 8, Ch. 365, L. 1974; R.C.M. 1947, 91-4437(part).**

**72-16-424. Rehearing of court determination within sixty days.** When an appraisement, assessment, or determination of tax is made by a district court, the attorney general, department of revenue, public administrator, county attorney, or any person dissatisfied with the appraisement or assessment and determination of such tax may apply for a rehearing thereof before the district court within 60 days from the fixing, assessing, and determination of the tax by the district court as herein provided on filing a written notice which shall state the grounds of the application for a rehearing. The rehearing shall be upon the records, proceedings, and proofs had and taken on the hearing as herein provided unless additional or newly discovered evidence be alleged therefor, and a new trial shall not be had or granted unless specially ordered by the district court.

**History: En. Sec. 15, Ch. 65, L. 1923; amd. Sec. 5, Ch. 150, L. 1925; amd. Sec. 3, Ch. 141, L. 1927; re-en. Sec. 10400.28, R.C.M. 1935; amd. Sec. 90, Ch. 391, L. 1973; amd. Sec. 9, Ch. 365, L. 1974; R.C.M. 1947, 91-4438.**

**72-16-425. Reappraisal within one year — appointment of appraiser — procedure.** (1) Within 1 year after the entry of an order or decree of the district court determining the value of an estate and assessing the tax thereon, the attorney general or the department of revenue may, if he or it believes that such appraisal, assessment, or determination has been erroneously, fraudulently, or collusively made, make application to the district judge for a reappraisal thereof.

(2) The district court to whom such application is made may thereupon appoint a competent person to reappraise such estate. Such appraiser shall possess the powers, be subject to the duties, shall give the notice, and receive the compensation provided by 72-16-412 to 72-16-425, inclusive. Such compensation shall be payable by the county treasurer out of any funds he may have on account of any tax imposed under the provisions of parts 1 through 8, upon the certificate of the district judge.

(3) The report of such appraiser shall be filed in the office of the clerk of the district court, and thereafter the same proceedings shall be taken and had by and before such district court as herein provided to be taken and had by and before the court.

(4) The determination and assessment of such district court shall supersede the former determination and assessment of such court and shall be filed in the office of the county treasurer, state treasurer, and department of revenue.

**History: En. Sec. 15, Ch. 65, L. 1923; amd. Sec. 5, Ch. 150, L. 1925; amd. Sec. 3, Ch. 141, L. 1927; re-en. Sec. 10400.29, R.C.M. 1935; amd. Sec. 91, Ch. 391, L. 1973; R.C.M. 1947, 91-4439.**

**72-16-426 through 72-16-430 reserved.**

**72-16-431. Tax — when due and payable.** All taxes imposed by parts 1 through 8 shall be due and payable at the time of the death of the decedent, except as hereinafter provided.

**History: En. Sec. 5, Ch. 65, L. 1923; re-en. Sec. 10400.5, R.C.M. 1935; amd. Sec. 1, Ch. 16, L. 1951; amd. Sec. 1, Ch. 99, L. 1965; amd. Sec. 1, Ch. 34, L. 1971; amd.**

**Sec. 77, Ch. 391, L. 1973; amd. Sec. 2, Ch. 424, L. 1975; R.C.M. 1947, 91-4415(part).**

**72-16-432. Tax lien — continuing personal liability.** (1) All property which is affected by the death of the decedent and on which inheritance, estate, or death taxes are due under the laws of this state is subject to the lien of the state of Montana until such taxes have been paid. This lien follows all property sold in the course of administration or distributed under chapters 1 through 5 until such time as all inheritance taxes have been paid and a receipt showing payment thereof has been filed with the clerk of court, subject to subsection (2).

(2) Every such tax shall be and remain a lien upon the property transferred for a period of 10 years from the time of the death of the decedent, whether said death occurred before or after July 1, 1965, unless sooner paid.

(3) The person to whom the property is transferred and the personal representatives and trustees of every estate so transferred shall be personally liable for such tax until its payment.

**History: (1)En. 91A-3-1010 by Sec. 1, Ch. 365, L. 1974; amd. Sec. 8, Ch. 516,L. 1975; Sec. 91A-3-1010, R.C.M. 1947; (2), (3)En. Sec. 5, Ch. 65, L. 1923; re-en. Sec. 10400.5, R.C.M. 1935; amd. Sec. 1, Ch. 16, L. 1951; amd. Sec. 1, Ch. 99, L. 1965; amd. Sec. 1, Ch. 34, L. 1971; amd. Sec. 77, Ch. 391, L. 1973; amd. Sec. 2, Ch. 424, L. 1975; Sec. 91-4415, R.C.M. 1947; R.C.M. 1947, 91-4415(part), 91A-3-1010(part).**

**72-16-433. Department consent to transfer free of lien.** The department of revenue may issue a consent to transfer any real or personal property in the estate of a decedent free of the lien for unpaid inheritance taxes upon proper application and under such rules as the department shall prescribe.

**History: En. 91A-3-1010 by Sec. 1, Ch. 365, L. 1974; amd. Sec. 8, Ch. 516, L. 1975; R.C.M. 1947, 91A-3-1010(part).**

**72-16-434. Method of payment and receipt.** (1) The tax shall be paid to the department of revenue for transmittal to the state treasurer or to the treasurer of the county in which the district court is situated having jurisdiction as herein provided or to the treasurer of the county of residence of the decedent if a court proceeding is not involved.

(2) If paid to the county treasurer said treasurer shall receipt therefor making five copies thereof and distribute said copies as follows:

(a) original receipt, to the clerk of the district court;

(b) first copy, to the personal representative, trustee, or person paying said tax;

(c) second copy, attached to and mailed with the report required by 72-16-215, as amended, to the department of revenue;

(d) third copy, to the county clerk and recorder;

(e) fourth copy, retained by the treasurer on file in his office.

(3) The copy of the receipt given to the personal representative or trustee shall be a proper voucher in the settlement of his accounts.

**History: En. Sec. 5, Ch. 65, L. 1923; re-en. Sec. 10400.5, R.C.M. 1935; amd. Sec. 1, Ch. 16, L. 1951; amd. Sec. 1, Ch. 99, L. 1965; amd. Sec. 1, Ch. 34, L. 1971; amd. Sec. 77, Ch. 391, L. 1973; amd. Sec. 2, Ch. 424, L. 1975; R.C.M. 1947, 91-4415(part).**

**72-16-435. Receipts — form and contents — recording.** (1) Any person shall be entitled to a receipt from the county treasurer of any county or the state treasurer or, at his option, to a copy of a receipt that may have been given by such county treasurer or state treasurer for the payment of any tax under parts 1 through 8, under the official seal of such county treasurer or state treasurer, which receipt shall designate upon whose estate such tax shall have been paid, by whom, and whether in full of such tax.

(2) Such receipt may be recorded in the office of the county recorder of the county in which such estate is situate in a book to be kept by him for that purpose, which shall be labeled "transfer tax".

**History: En. Sec. 21, Ch. 65, L. 1923; re-en. Sec. 10400.42, R.C.M. 1935; R.C.M. 1947, 91-4452.**

**72-16-436. Powers and duties of representative in collection and payment of tax.** (1) Every personal representative shall have full power to sell so much of the property of the decedent as will enable him to pay such tax in the same manner as he might be entitled by law to do for the payment of the debts of the testator or intestate. Any such personal representative having in charge or in trust any property for distribution subject to such tax shall deduct the tax therefrom and within 30 days therefrom shall pay over the same to the county treasurer, as herein provided.

(2) If such property be not in money, he shall collect the tax thereon upon the appraised value thereof from the person entitled thereto. He shall not deliver or be compelled to deliver any specific property subject to tax under this law to any person until he shall have collected the tax thereon. If any such devise shall be charged upon or payable out of real property, the heir or devisee shall deduct such tax therefrom and pay it to the personal representative, and the tax shall remain a lien or charge on such real property for the period provided in 72-16-432, and the payment thereof shall be enforced by the personal representative in the same manner that payment of the devise might be enforced or by the attorney general under 72-16-443. If any such devise shall be given in money to any such person for a limited period, the personal representative shall retain the tax upon the whole amount, but if it be not in money and agreement as to apportionment cannot be reached by him with the devisee or devisees affected, he shall make application to the appropriate court to make an apportionment, if the case require it, of the sum to be paid into the hands of such devisees and for such further order relative thereto as the case may require, such application being treated as a supervised proceeding.

**History: En. Sec. 7, Ch. 65, L. 1923; re-en. Sec. 10400.7, R.C.M. 1935; amd. Sec. 2, Ch. 99, L. 1965; amd. Sec. 5, Ch. 365, L. 1974; R.C.M. 1947, 91-4417.**

**72-16-437. Personal representative not entitled to closing unless tax paid or bond filed.** No personal representative or trustee shall be entitled to a final accounting of an estate in settlement of which a tax is due under the provisions of parts 1 through 8 unless he shall produce such receipt or a certified copy thereof or unless a bond shall have been filed as prescribed by 72-16-438.

**History: En. Sec. 5, Ch. 65, L. 1923; re-en. Sec. 10400.5, R.C.M. 1935; amd. Sec. 1, Ch. 16, L. 1951; amd. Sec. 1, Ch. 99, L. 1965; amd. Sec. 1, Ch. 34, L. 1971; amd. Sec. 77, Ch. 391, L. 1973; amd. Sec. 2, Ch. 424, L. 1975; R.C.M. 1947, 91-4415(part).**

**72-16-438. Permission for deferred payment of tax.** Any beneficiary of any property chargeable with a tax under 72-16-301 through 72-16-304 and 72-16-307 and any personal representative or trustee of the estate may request, within 18 months from the date of the death of decedent or transfer of the property, permission not to pay such tax or a portion thereof until the person beneficially interested comes into the actual possession or enjoyment thereof or until payment can be made without liquidating a portion of the capital assets. The department may permit the deferral of payment for not more than 5 years, upon such conditions and terms as the department considers necessary to assure payment.

**History: En. Sec. 9, Ch. 65, L. 1923; re-en. Sec. 10400.9, R.C.M. 1935; amd. Sec. 79, Ch. 391, L. 1973; amd. Sec. 6, Ch. 490, L. 1977; R.C.M. 1947, 91-4419.**

**72-16-439. Advance payment — relief from interest or penalty — discount — refund of excess paid.** (1) Any person from whom such tax is or may be due may make an estimate of and pay the same to the county treasurer, who shall receipt therefor, at any time before the same is determined by the department of revenue and shall thereupon be relieved from any interest or penalty upon the amount so paid in the same manner as if the tax were then determined.

(2) In the event the person making payment has done so in accordance with the provisions of 72-16-440 pertaining to the allowance of a 5% discount, the person making payment shall be relieved from any interest or penalty and shall be allowed the 5% discount upon the amount which he so declared due as his inheritance tax liability. The tax may be declared to be due by paying the amount estimated by the taxpayer to the county treasurer.

(3) The money shall be paid to the county treasurer who must deposit same with the department of revenue. The county treasurer shall pay the collections to the department on or before the fifth day of the month following the collection.

(4) As soon as the correct amount of inheritance tax has been determined, any excess so paid shall be refunded to the person so paying or entitled thereto by the department.

**History: En. Sec. 8, Ch. 65, L. 1923; amd. Sec. 1, Ch. 47, L. 1935; re-en. Sec. 10400.8, R.C.M. 1935; amd. Sec. 7, Ch. 126, L. 1963; amd. Sec. 2, Ch. 15, L. 1967; amd. Sec. 1, Ch. 36, L. 1971; amd. Sec. 1, Ch. 316, L. 1973; amd. Sec. 78, Ch. 391, L. 1973; amd. Sec. 3, Ch. 424, L. 1975; R.C.M. 1947, 91-4418(part).**

**72-16-440. Discount for prompt payment.** If the tax is paid within 18 months of the death of the decedent, a discount of 5% shall be deducted therefrom. The deduction of this discount of 5% shall be accomplished by paying within the 18-month period from the date that the tax accrues an amount equal to 95% of the total tax declared due by the person making payment.

**History: En. Sec. 6, Ch. 65, L. 1923; re-en. Sec. 10400.6, R.C.M. 1935; amd. Sec. 1, Ch. 15, L. 1967; amd. Sec. 5, Ch. 490, L. 1977; R.C.M. 1947, 91-4416(1).**

**72-16-441. Interest on overdue payments.** (1) If such tax is not paid within 18 months of the death of the decedent, interest shall be charged and collected thereon at the rate of 10% a year from the time the tax accrued, unless because of claims made upon the estate, necessary litigation, or other unavoidable cause of delay the tax is not determined and paid as herein provided, in which case interest at the rate of 6% shall be charged upon such tax from the accrual thereof until the cause of such delay is removed, after which time 10% shall be charged.

(2) Litigation to defeat the payment of the tax is not necessary litigation.

(3) When permission has been granted to defer payment of tax under 72-16-438, interest shall be charged at the rate of 6% after 1 year from the date of death until the date of payment thereof.

**History: En. Sec. 6, Ch. 65, L. 1923; re-en. Sec. 10400.6, R.C.M. 1935; amd. Sec. 1, Ch. 15, L. 1967; amd. Sec. 5, Ch. 490, L. 1977; R.C.M. 1947, 91-4416(2).**

**72-16-442. Refund of tax when debt against estate proved after distribution.** If any debt shall be proved against the estate of the decedent after the payment of any legacy or distributive share thereof from which any such tax has been deducted or upon which it has been paid by the person entitled to such legacy or distributive share and such person is required by the order of the district court having jurisdiction of the tax so deducted or paid to refund the amount of such debts or any part thereof, an equitable proportion thereof shall be repaid to such person by the personal representative or trustee, if the tax has not been paid to the county treasurer or state treasurer, or by them, in the proper proportionate shares, if it has been so paid.

**History: En. Sec. 8, Ch. 65, L. 1923; amd. Sec. 1, Ch. 47, L. 1935; re-en. Sec. 10400.8, R.C.M. 1935; amd. Sec. 7, Ch. 126, L. 1963; amd. Sec. 2, Ch. 15, L. 1967; amd. Sec. 1, Ch. 36, L. 1971; amd. Sec. 1, Ch. 316, L. 1973; amd. Sec. 78, Ch. 391, L. 1973; amd. Sec. 3, Ch. 424, L. 1975; R.C.M. 1947, 91-4418(part).**

**72-16-443. Collection of unpaid taxes.** (1) If any county treasurer, state treasurer, or the department of revenue shall have reason to believe that any tax is due and unpaid under the provisions of parts 1 through 8, after the refusal or neglect of any person liable therefor to pay the same, he or it shall notify the attorney general in writing of such failure or neglect, and the attorney general, if he have probable cause to believe that such tax is due and unpaid, shall apply to the district court for a citation citing the person liable to pay such tax to appear before the court on the day specified, not more than 3 months from the date of such citation, and show cause why the tax should not be paid.

(2) The judge of the district court, upon such application and whenever it shall appear to him that any such tax accruing under parts 1 through 8 has not been paid as required by law, shall issue such citation, and the service of such citation and the time, manner, and proof thereof and the hearing and determination thereof shall conform as near as may be to the provisions of the laws governing probate practice of this state.

(3) Whenever it shall appear that any such tax is due and payable and the payment thereof cannot be enforced under the provisions of parts 1 through 8 in said district court, the person or corporation from whom the same is due is hereby made liable to the state for the amount of such tax, and it shall be the duty of the attorney general, in the name of the state, to sue for and enforce the collection of such tax, and it is made the duty of the county attorney of the county to appear for and act on behalf of any county treasurer, who shall be cited to appear before any district court under the provisions of parts 1 through 8.

**History: En. Sec. 16, Ch. 65, L. 1923; re-en. Sec. 10400.30, R.C.M. 1935; amd. Sec. 92, Ch. 391, L. 1973; R.C.M. 1947, 91-4440.**

## Part 5

## Joint Tenancies and Life Estates Determination of Tax — Termination

**72-16-501. Interest of decedent terminated upon death.** The interest of the decedent in property held in joint tenancy terminates upon his death.

**History: En. 91-4471 by Sec. 2, Ch. 409, L. 1977; R.C.M. 1947, 91-4471(2).**

**72-16-502. Determination and payment of tax when no personal representative — procedure.** (1) For the purposes of this section, a decedent is one who dies leaving no property which requires the appointment of a personal representative and:

(a) was the owner of a life estate which terminated at his death;

(b) was the owner of property with another or others as a joint tenant with right of survivorship and not as a tenant in common; or

(c) was the owner of any other interest in property requiring the determination of inheritance tax because of his death.

(2) Upon the death of a decedent, a remainderman, surviving joint tenant, or other interested party shall file with the department of revenue:

(a) a copy of the death certificate;

(b) a verified application in a form prescribed by the department containing such information as the department considers necessary; and

(c) evidence of the instruments which created the life estate, joint tenancy, or other interest requiring determination of inheritance tax, if required by the department.

(3) Upon receipt of the application, the department shall:

(a) stamp the filing date upon the application;

(b) issue a certificate showing the inheritance tax due, if any;

(c) affix the certificate to a certified copy of the application and return the same to the applicant or his attorney; and

(d) affix a copy of the certificate to the original application and keep it on file with the department.

(4) The applicant shall pay the inheritance tax determined to the county treasurer for transmittal to the state treasurer. The county treasurer shall issue a receipt for the payment of the tax.

(5) If disputes arise as to tax computation, they shall be resolved as provided under the laws applicable to the determination of inheritance taxes in estates.

**History: En. 91-4470 by Sec. 1, Ch. 409, L. 1977; R.C.M. 1947, 91-4470.**

**72-16-503. Additional filings required when real property involved and no representative — release of lien.** (1) If an interest in real property is involved under 72-16-502, the applicant shall file with the clerk and recorder of each county in which the real property or any part thereof is located:

(a) a certified copy of the application referred to in subsection (2)(b) of 72-16-502;

(b) the certificate from the department of revenue determining inheritance tax, if any;

(c) the receipt from the county treasurer showing the inheritance tax has been paid.

(2) The filing of the documents under subsection (1) constitutes release of any lien for inheritance taxes.

**History: En. 91-4471 by Sec. 2, Ch. 409, L. 1977; R.C.M. 1947, 91-4471(1), (3).**

**72-16-504. Determination and payment of tax when personal representative appointed — procedure.** If a decedent dies leaving property which requires the appointment of a personal representative and was also an owner of property as described in 72-16-502(1), the remainderman, surviving joint tenant, personal representative, or other interested party may have the inheritance tax determined and the joint tenancy terminated or ownership transferred as provided in 72-16-501 through 72-16-503 by filing with the department:

(1) the information listed in 72-16-502(2); and

(2) the name of the county of administration or probate and the court file number.

**History: En. 91-4472 by Sec. 3, Ch. 409, L. 1977; R.C.M. 1947, 91-4472.**

**72-16-505. Attorney not required for transfer of title — maximum attorney's fee.** (1) If a decedent as defined in 72-16-502 leaves a surviving spouse, the surviving spouse is not required to hire an attorney to transfer title to the property involved.

(2) If an attorney is hired by the surviving spouse, the attorney's fee for services required in terminating a joint tenancy or transferring other types of ownership listed in 72-16-502 may not exceed 2% of the value of the interest passing to the spouse.

**History: En. 91-4473 by Sec. 4, Ch. 409, L. 1977; R.C.M. 1947, 91-4473.**

## Part 6

## Apportionment of Taxes

**72-16-601. Definitions.** For purposes of this part, the following definitions apply:

(1) "Estate" means the gross estate of a decedent as determined for the purpose of federal estate tax and the estate tax payable to this state.

(2) "Fiduciary" means personal representative or trustee.

(3) "Person" means any individual, partnership, association, joint-stock company, corporation, government, political subdivision, governmental agency, or local governmental agency.

(4) "Person interested in the estate" means any person entitled to receive or who has received from a decedent or by reason of the death of a decedent any property or interest therein included in the decedent's estate. It includes a personal representative, conservator, and trustee.

(5) "State" means any state, territory, or possession of the United States, the District of Columbia, and the Commonwealth of Puerto Rico.

(6) "Tax" means the federal estate tax and any additional inheritance, estate, or death taxes imposed by the laws of any state and interest and penalties imposed in addition to the tax.

**History: En. 91A-3-916 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-3-916(1).**

**72-16-602. Authority of court of administration to determine apportionment.** The court in which venue lies for the administration of the estate of a decedent, on petition for the purpose, may determine the apportionment of the tax.

**History: En. 91A-3-916 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-3-916(3)(a).**

**72-16-603. Tax — how apportioned.** (1) Unless the will otherwise provides, the tax shall be apportioned among all persons interested in the estate. The apportionment is to be made in the proportion that the value of the interest of each person interested in the estate bears to the total value of the interests of all persons interested in the estate. The values used in determining the tax are to be used for that purpose.

(2) If the decedent's will directs a method of apportionment of tax different from the method described in this code, the method described in the will controls.

**History: En. 91A-3-916 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-3-916(2).**

**72-16-604. Equitable power of court to vary manner of apportionment.** If the court finds that it is inequitable to apportion interest and penalties in the manner provided in 72-16-603 because of special circumstances, it may direct apportionment thereof in the manner it finds equitable.

**History: En. 91A-3-916 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-3-916(3)(b).**

**72-16-605. Distribution prior to apportionment — bond required.** If property held by the personal representative is distributed prior to final apportionment of the tax, the distributee shall provide a bond or other security for the apportionment liability in the form and amount prescribed by the personal representative.

**History: En. 91A-3-916 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-3-916(4)(b).**

**72-16-606. No apportionment as between temporary interest and remainder.** No interest in income and no estate for years or for life or other temporary interest in any property or fund is subject to apportionment as between the temporary interest and the remainder. The tax on the temporary interest and the tax, if any, on the remainder is chargeable against the corpus of the property or funds subject to the temporary interest and remainder.

**History: En. 91A-3-916 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-3-916(6).**

**72-16-607. Allowance for exemptions, deductions, and credits.** (1) In making an apportionment, allowances shall be made for any exemptions granted, any classification made of persons interested in the estate, and for any deductions and credits allowed by the law imposing the tax.

(2) Any exemption or deduction allowed by reason of the relationship of any person to the decedent or by reason of the purposes of the gift inures to the benefit of the person bearing such relationship or receiving the gift, but if an interest is subject to a prior present interest which is not allowable as a deduction, the tax apportionable against the present interest shall be paid from principal.

(3) Any deduction for property previously taxed and any credit for gift taxes or death taxes of a foreign country paid by the decedent or his estate inures to the proportionate benefit of all persons liable to apportionment.

(4) Any credit for inheritance, succession, or estate taxes or taxes in the nature thereof applicable to property or interests includable in the estate inures to the benefit of the persons or interests chargeable with the payment thereof to the extent proportionately that the credit reduces the tax.

(5) To the extent that property passing to or in trust for a surviving spouse or any charitable, public, or similar gift or devise is not an allowable deduction for purposes of the tax solely by reason of an inheritance tax or other death tax imposed upon and deductible from the property, the property is not included in the computation provided for in 72-16-603 and to that extent no apportionment is made against the property. The sentence immediately preceding does not apply to any case if the result would be to deprive the estate of a deduction otherwise allowable under section 2053(d) of the Internal Revenue Code of 1954, as amended, of the United States, relating to deduction for state death taxes on transfers for public, charitable, or religious uses.

**History: En. 91A-3-916 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-3-916(5).**

**72-16-608. Powers of personal representative in relation to satisfaction of tax liability.** (1) The personal representative or other person in possession of the property of the decedent required to pay the tax may withhold from any property distributable to any person interested in the estate, upon its distribution to him, the amount of tax attributable to his interest.

(2) If the property in possession of the personal representative or other person required to pay the tax and distributable to any person interested in the estate is insufficient to satisfy the proportionate amount of the tax determined to be due from the person, the personal representative or other person required to pay the tax may recover the deficiency from the person interested in the estate.

(3) If the property is not in the possession of the personal representative or the other person required to pay the tax, the personal representative or the other person required to pay the tax may recover from any person interested in the estate the amount of the tax apportioned to the person in accordance with this part.

**History: En. 91A-3-916 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-3-916(4)(a).**

**72-16-609. Penalties and interest charged to fiduciary when caused by his negligence.** If the court finds that the assessment of penalties and interest assessed in relation to the tax is due to delay caused by the negligence of the fiduciary, the court may charge him with the amount of the assessed penalties and interest.

**History: En. 91A-3-916 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-3-916(3)(c).**

**72-16-610. Action to recover apportioned tax — limitations on duty to initiate — uncollectability.** Neither the personal representative nor other person required to pay the tax is under any duty to institute any action to recover from any person interested in the estate the amount of the tax apportioned to the person until the expiration of the 3 months next following final determination of the tax. A personal representative or other person required to pay the tax who institutes the action within a reasonable time after the 3-month period is not subject to any liability or surcharge because any portion of the tax apportioned to any person interested in the estate was collectable at a time following the death of the decedent but thereafter became uncollectable. If the personal representative or other person required to pay the tax cannot collect from any person interested in the estate the amount of the tax apportioned to the person, the amount not recoverable shall be equitably apportioned among the other persons interested in the estate who are subject to apportionment.

**History: En. 91A-3-916 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-3-916(7).**

**72-16-611. Action to recover apportioned tax — determination of court prima facie correct.** In any action to recover from any person interested in the estate the amount of the tax apportioned to the person in accordance with this part, the determination of the court in respect thereto made pursuant to 72-16-602 shall be prima facie correct.

**History: En. 91A-3-916 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-3-916(3)(d).**

**72-16-612. Action by foreign representative to recover apportioned tax.** A personal representative acting in another state or a person required to pay the tax domiciled in another state may institute an action in the courts of this state and may recover a proportionate amount of the federal estate tax, of an estate tax payable to another state, or of a death duty due by a decedent's estate to another state from a person interested in the estate who is either domiciled in this state or who owns property in this state subject to attachment or execution. For the purposes of the action, the determination of apportionment by the court having jurisdiction of the administration of the decedent's estate in the other state is prima facie correct.

**History: En. 91A-3-916 by Sec. 1, Ch. 365, L. 1974; R.C.M. 1947, 91A-3-916(8).**

## Part 7

## Estates With Multistate Aspects — Securities Transfer

**72-16-701. Transfer of in-state securities by foreign representative — payment of tax.** If a foreign executor, administrator, or trustee shall assign or transfer any stocks, bonds, mortgages, or other securities, in this state or within the jurisdiction of this state standing in the name of a decedent or in trust for a decedent liable to any such tax, the tax shall be paid to the treasurer of the proper county or the state treasurer on the transfer thereof; otherwise the corporation permitting such transfer shall become liable to pay such tax.

**History: En. Sec. 11, Ch. 65, L. 1923; amd. Sec. 2, Ch. 150, L. 1925; amd. Sec. 2, Ch. 105, L. 1927; amd. Sec. 1, Ch. 130, L. 1929; re-en. Sec. 10400.11, R.C.M. 1935; amd. Sec. 1, Ch. 62, L. 1953; amd. Sec. 80, Ch. 391, L. 1973; R.C.M. 1947, 91-4421(1).**

**72-16-702. Duties of holder of securities or assets of nonresident decedent — prerequisites to transfer — exception.** (1) No safe deposit company, bank, or other institution or person or persons holding securities or assets of a nonresident decedent or any corporation organized under the laws of this state in which a nonresident decedent held stock, bonds, mortgages, or other securities at his decease shall deliver or transfer the same to the executors, administrators, or legal representatives of said decedent or upon their order or request unless notice of the time and place of such intended transfer be served upon the department of revenue at least 10 days prior to the transfer; nor shall any such safe deposit company, bank, or other institution or person or persons or any corporation deliver or transfer any securities or assets of the estate of a nonresident decedent without retaining a sufficient portion or amount thereof to pay any tax which may thereafter be assessed on account of the transfer of such securities or assets under the provisions of the inheritance tax laws, without an order from the proper court authorizing such transfer; and it shall be lawful for the department, personally or by representative, to examine said securities or assets at any time before such delivery or transfer.

(2) Failure to serve such notice or to allow such examination or to retain a sufficient portion or amount to pay such tax as herein provided shall render said safe deposit company, trust company, bank, or other institution or person or persons or such corporation liable to the payment of the tax due upon said securities or assets in pursuance of the provisions of the inheritance tax laws.

(3) The department may issue a certificate authorizing the transfer of any such stock, securities, or assets whenever it appears to the satisfaction of the department that no tax is due thereon.

(4) The foregoing provisions shall not apply to shares of stock in any Montana corporation held by a nonresident of Montana at the time of his death whose death occurred on or after January 30, 1945 and who was at the time of his death domiciled in any other district or state of the United States, provided reciprocal rights are granted by such district or state of domicile similar to 72-16-801, and in such event this section shall not apply to the transfer of stocks, bonds, mortgages, or other securities exempt from taxation under the provisions of 72-16-801, and a Montana corporation or its agent may transfer stocks, bonds, mortgages, and other securities without any liability for the tax imposed under the provisions of the

inheritance tax laws where there are reciprocal rights as set forth in 72-16-801, and in such event no application for consent to transfer such stock need be made to the department, and the corporation or its duly authorized transfer agent may transfer such shares of stock upon its books without any such application or consent to transfer.

**History: En. Sec. 11, Ch. 65, L. 1923; amd. Sec. 2, Ch. 150, L. 1925; amd. Sec. 2, Ch. 105, L. 1927; amd. Sec. 1, Ch. 130, L. 1929; re-en. Sec. 10400.11, R.C.M. 1935; amd. Sec. 1, Ch. 62, L. 1953; amd. Sec. 80, Ch. 391, L. 1973; R.C.M. 1947, 91-4421(2).**

**72-16-703. Holder of securities in Montana corporation not to transfer without retaining portion for tax.** No holding company or other corporation subject to the provisions of this part shall deliver or transfer any such stocks, bonds, mortgages, or other securities of a Montana corporation without retaining a sufficient portion thereof to pay any tax which may thereafter be assessed under the provisions of parts 1 through 8 on account of such transfer, except upon order of the proper court or a certificate of consent of the department of revenue.

**History: En. Sec. 11, Ch. 65, L. 1923; amd. Sec. 2, Ch. 150, L. 1925; amd. Sec. 2, Ch. 105, L. 1927; amd. Sec. 1, Ch. 130, L. 1929; re-en. Sec. 10400.11, R.C.M. 1935; amd. Sec. 1, Ch. 62, L. 1953; amd. Sec. 80, Ch. 391, L. 1973; R.C.M. 1947, 91-4421(part).**

**72-16-704. Apportionment of deductions when property partly within and partly without the state.** Whenever a tax may be due from the estate or the beneficiaries therein of any resident or nonresident decedent upon the transfer of any property, when the property or the estate left by such decedent is partly within and partly without this state, or upon any stocks, bonds, mortgages, or other securities representing property or estate partly within and partly without this state, any beneficiary of such estate shall be entitled to deduct only his proper proportion of that portion of the total debts and expenses of administration which the gross estate in Montana or within its jurisdiction bears to the gross estate both within and without this state, but no deduction shall be made for any federal estate, inheritance, succession, or transfer taxes paid to the United States. As to his Montana exemption, each beneficiary shall be entitled to deduct only that portion represented by the ratio between his interest in the property in this state or within its jurisdiction and his interest in the entire estate.

**History: En. Sec. 11, Ch. 65, L. 1923; amd. Sec. 2, Ch. 150, L. 1925; amd. Sec. 2, Ch. 105, L. 1927; amd. Sec. 1, Ch. 130, L. 1929; re-en. Sec. 10400.11, R.C.M. 1935; amd. Sec. 1, Ch. 62, L. 1953; amd. Sec. 80, Ch. 391, L. 1973; R.C.M. 1947, 91-4421(3).**

**72-16-705. Department to secure information — rulemaking.** The department of revenue shall require such reports and information and shall make such orders and rules as it may deem necessary to enable the department to secure the necessary information from domestic corporations and to ascertain the amount of and collect such tax.

**History: En. Sec. 11, Ch. 65, L. 1923; amd. Sec. 2, Ch. 150, L. 1925; amd. Sec. 2, Ch. 105, L. 1927; amd. Sec. 1, Ch. 130, L. 1929; re-en. Sec. 10400.11, R.C.M. 1935; amd. Sec. 1, Ch. 62, L. 1953; amd. Sec. 80, Ch. 391, L. 1973; R.C.M. 1947, 91-4421(part).**

**72-16-706. Penalty.** Any corporation or holding company violating the provisions of this part shall be liable to the state for the amount of the tax together with a penalty of 10% thereof.

**History: En. Sec. 11, Ch. 65, L. 1923; amd. Sec. 2, Ch. 150, L. 1925; amd. Sec. 2, Ch. 105, L. 1927; amd. Sec. 1, Ch. 130, L. 1929; re-en. Sec. 10400.11, R.C.M.**

**1935; amd. Sec. 1, Ch. 62, L. 1953; amd. Sec. 80, Ch. 391, L. 1973; R.C.M. 1947, 91-4421(5).**

## Part 8

## Nonresident Decedents

**72-16-801. Exemption of intangible personal property of nonresident decedent — when.** The tax imposed by parts 3, 7, 9, and this part, in respect of personal property, except tangible personal property having an actual situs in this state, shall not be payable if:

(1) the decedent is a resident of a state or territory of the United States which at the time of the transfer did not impose a transfer tax or death tax of any character in respect of personal property of residents of this state, except tangible personal property having an actual situs in that state or territory; or

(2) the laws of the state or territory of residence of the nonresident decedent at the time of the transfer contained a reciprocal provision under which nonresidents of that state were exempted from transfer tax or death taxes of every character in respect of personal property, except tangible personal property having an actual situs in that state, providing the state or territory of residence of such nonresident decedent allowed a similar exemption to residents of this state.

**History: En. Sec. 1, Ch. 3, L. 1945; R.C.M. 1947, 91-4413.**

**72-16-802. Nonresident decedent — application to department for determination of tax — affidavit.** (1) Any personal representative, trustee, heir, devisee, or legatee of a nonresident decedent leaving no estate requiring administration in this state desiring to transfer any stocks, bonds, mortgages, or other securities or other personal property in this state or within the jurisdiction of this state may make application to the department of revenue for the determination whether there is any tax due upon account of the transfer thereof and the amount of any such tax.

(2) Such applicant shall furnish to the department an affidavit:

(a) setting forth a description and statement of the property owned by the decedent situated within this state or within its jurisdiction at the time of his death and the true value of said property at the time of decedent's death;

(b) setting forth a description and statement of the true value of all property owned by the decedent at the time of his death situated outside of this state and without its jurisdiction; and

(c) containing a schedule or statement of all valid claims against the estate of the decedent, including the expenses of his last illness, funeral expenses, and expenses of administering his estate.

(3) Such applicant shall also, at the same time, furnish the department with:

(a) a certified copy of the last will of the decedent, in case he died testate or an affidavit setting forth the names, ages, and residence of the heirs at law of decedent in case he died intestate;

(b) the proportion of the entire estate of said decedent inherited by each of said persons; and

(c) the relation, if any, which each legatee, devisee, heir, or transferee sustained to the decedent or person from whom the transfer was made.

(4) Such affidavit shall be subscribed and sworn to by the personal representative of the decedent or some other person having knowledge of the facts therein set forth.

(5) The statement contained in any affidavits, statements, or schedules as to values or otherwise shall not be binding upon the department in case it believes the same to be erroneous or untrue.

**History: En. Sec. 12, Ch. 65, L. 1923; amd. Sec. 3, Ch. 150, L. 1925; re-en. Sec. 10400.15, R.C.M. 1935; amd. Sec. 82, Ch. 391, L. 1973; R.C.M. 1947, 91-4425(part).**

**72-16-803. Department to determine tax.** From the information so furnished it and such other information as it may be able to obtain with reference thereto, the department of revenue shall with reasonable diligence proceed to ascertain and determine the amount of tax, if any, due under the provisions of parts 1 through 8 and notify the person making the application of the amount of the tax so ascertained and determined to be due; or, in case there is no tax to be paid, the department shall issue a consent to the transfer of the property so owned by the decedent.

**History: En. Sec. 12, Ch. 65, L. 1923; amd. Sec. 3, Ch. 150, L. 1925; re-en. Sec. 10400.15, R.C.M. 1935; amd. Sec. 82, Ch. 391, L. 1973; R.C.M. 1947, 91-4425(part).**

**72-16-804. Appeal from determination of department.** Any person aggrieved by the determination of the department of revenue in any matter provided for in 72-16-802 or 72-16-803 may, within 30 days thereafter, appeal to the district court of Lewis and Clark County by serving on the department a notice in writing setting forth his objections to such determination and by filing such notice, after so serving the same, in the office of the clerk of such court, and thereupon and within 10 days after the service of such notice on it the department shall transmit full and complete copies of all original papers and records which have been filed with it in relation to such application to the clerk of said district court, and thereupon the district court shall have jurisdiction of such application and proceeding. Upon 10 days' notice given by either applicant or the department, the matter may be brought on for hearing and determination by said court, either in term time or in vacation, at a general or special term of court or at chambers, as may be directed by the order of the court.

**History: En. Sec. 12, Ch. 65, L. 1923; amd. Sec. 3, Ch. 150, L. 1925; re-en. Sec. 10400.15, R.C.M. 1935; amd. Sec. 82, Ch. 391, L. 1973; R.C.M. 1947, 91-4425(3).**

**72-16-805. Procedure of department when application not made.** (1) Whenever any nonresident decedent leaving no estate requiring administration in this state shall leave any stocks, bonds, mortgages, or other securities or other personal property within the state or within the jurisdiction thereof and no personal representative, trustee, heir, devisee, or legatee of such nonresident decedent has made application to the department of revenue for the determination as to whether there is any tax due for the transfer thereof and the amount of such tax, if any, the department, upon such matter being called to its attention, shall make an order and cause a copy thereof to be served upon the personal representative, trustee, heirs, devisees, or legatees of such nonresident decedent ordering and directing that a statement and return, under oath, containing the statements and information prescribed in 72-16-802 be filed with such department within 60 days from the date of such order or within such further time as the department may grant therefor.

(2) If such statement is not filed with the department within such time, the department may then procure such information in any manner it may deem advisable.

(3) Upon the filing of such statement or the procuring of such information by the department in the event of a failure to file the same in compliance with such

order, the department shall proceed in the same manner as prescribed by 72-16-803 and all provisions of 72-16-804 with reference to hearings and appeals shall be applicable thereto.

**History: En. Sec. 12, Ch. 65, L. 1923; amd. Sec. 3, Ch. 150, L. 1925; re-en. Sec. 10400.16, R.C.M. 1935; amd. Sec. 33, Ch. 391, L. 1973; R.C.M. 1947, 91-4426.**

## Part 9

## Estate Tax

**72-16-901. Purpose — liberal construction to effect.** It is hereby declared to be the intent and purpose of this part to obtain for this state the benefit of the credit allowed under the provisions of the Internal Revenue Code, to the extent that this state may be entitled by the provisions of said act, by imposing additional taxes, and the same shall be liberally construed to effect this purpose.

**History: En. Sec. 2, Ch. 48, Ex. L. 1933; re-en. Sec. 10400.3a, R.C.M. 1935; amd. Sec. 1, Ch. 360, L. 1969; amd. Sec. 1, Ch. 28, L. 1971; amd. Sec. 12, Ch. 365, L. 1974; R.C.M. 1947, 91-4411(g).**

**72-16-902. Applicability of other tax provisions.** The provisions of parts 1 through 8 relating to the tax on inheritances and transfers shall apply to the taxes imposed by this part, insofar as the same are applicable and not in conflict with the provisions hereof.

**History: En. Sec. 2, Ch. 48, Ex. L. 1933; re-en. Sec. 10400.3a, R.C.M. 1935; amd. Sec. 1, Ch. 360, L. 1969; amd. Sec. 1, Ch. 28, L. 1971; amd. Sec. 12, Ch. 365, L. 1974; R.C.M. 1947, 91-4411(h).**

**72-16-903. Taxable situs of property.** For the purpose of this tax, the taxable situs of property shall be the same as the taxable situs for inheritance tax purposes.

**History: En. Sec. 2, Ch. 48, Ex. L. 1933; re-en. Sec. 10400.3a, R.C.M. 1935; amd. Sec. 1, Ch. 360, L. 1969; amd. Sec. 1, Ch. 28, L. 1971; amd. Sec. 12, Ch. 365, L. 1974; R.C.M. 1947, 91-4411(part).**

**72-16-904. Estate tax imposed.** In addition to the inheritance taxes hereinabove imposed, an estate tax is hereby imposed upon the transfer of the estate of every decedent leaving an estate which is subject to the federal estate tax imposed by the United States of America under the applicable provisions of the Internal Revenue Code and which has, in whole or in part, a taxable situs in this state.

**History: En. Sec. 2, Ch. 48, Ex. L. 1933; re-en. Sec. 10400.3a, R.C.M. 1935; amd. Sec. 1, Ch. 360, L. 1969; amd. Sec. 1, Ch. 28, L. 1971; amd. Sec. 12, Ch. 365, L. 1974; R.C.M. 1947, 91-4411(part).**

**72-16-905. Estate tax — how computed.** The tax hereby imposed upon the transfer of each such estate shall be equal to the maximum tax credit allowable for state death taxes against the federal estate tax imposed with respect to the portion of the decedent's estate having a taxable situs in this state, less the inheritance taxes, if any, due this state, it being the purpose and intent of this part to impose only such additional taxes hereunder as may be necessary to give this state the full benefit of the maximum tax credit allowable against the federal estate tax imposed with respect to a decedent's estate which has a taxable situs in this state. If only a portion of a decedent's estate has a taxable situs in this state, such maximum tax credit shall be determined by multiplying the entire amount of the credit allowable against the federal estate tax for state death taxes by the percentage which the value of the portion of the decedent's estate which has a taxable situs in this state bears to the value of the entire estate.

**History: En. Sec. 2, Ch. 48, Ex. L. 1933; re-en. Sec. 10400.3a, R.C.M. 1935; amd. Sec. 1, Ch. 360, L. 1969; amd. Sec. 1, Ch. 28, L. 1971; amd. Sec. 12, Ch. 365, L. 1974; R.C.M. 1947, 91-4411(part).**

**72-16-906. Required filings.** It shall be the duty of the personal representative of the estate of any decedent whose estate may be subject to the payment of a United States estate tax to file duplicates of the United States estate tax returns with the district court of the county in which such estate is being probated and with the department of revenue. He shall also file with such court and with the department a certificate or other evidence from the bureau of internal revenue showing the amount of the United States estate tax as computed by that department.

**History: En. Sec. 2, Ch. 48, Ex. L. 1933; re-en. Sec. 10400.3a, R.C.M. 1935; amd. Sec. 1, Ch. 360, L. 1969; amd. Sec. 1, Ch. 28, L. 1971; amd. Sec. 12, Ch. 365, L. 1974; R.C.M. 1947, 91-4411(part).**

**72-16-907. Department to determine tax — rehearing and appeal.** (1) The department of revenue shall enter an order determining such state estate tax and the amount thereof so due and payable.

(2) Any person in interest aggrieved by such determination shall have the same right to apply for district court determination and of rehearing and appeal as is now provided for in the determination of inheritance taxes.

**History: En. Sec. 2, Ch. 48, Ex. L. 1933; re-en. Sec. 10400.3a, R.C.M. 1935; amd. Sec. 1, Ch. 360, L. 1969; amd. Sec. 1, Ch. 28, L. 1971; amd. Sec. 12, Ch. 365, L. 1974; R.C.M. 1947, 91-4411(part).**

**72-16-908. Persons liable for tax.** Administrators, executors, trustees, and grantees under a conveyance made during the grantor's life and taxable hereunder shall be liable for such taxes with interest until the same have been paid.

**History: En. Sec. 2, Ch. 48, Ex. L. 1933; re-en. Sec. 10400.3a, R.C.M. 1935; amd. Sec. 1, Ch. 360, L. 1969; amd. Sec. 1, Ch. 28, L. 1971; amd. Sec. 12, Ch. 365, L. 1974; R.C.M. 1947, 91-4411(c).**

**72-16-909. When and where tax payable — interest.** The estate tax shall be payable to the county treasurer of the county in which such estate is being probated at the same time or times at which the United States tax is payable and shall bear interest, if any, at the same rate and for the same period as such United States tax.

**History: En. Sec. 2, Ch. 48, Ex. L. 1933; re-en. Sec. 10400.3a, R.C.M. 1935; amd. Sec. 1, Ch. 360, L. 1969; amd. Sec. 1, Ch. 28, L. 1971; amd. Sec. 12, Ch. 365, L. 1974; R.C.M. 1947, 91-4411(b).**

**72-16-910. Extension of time for payment.** The district court of the county in which such estate is being probated may, for cause shown, extend the time of payment of said tax whenever the circumstances of the case require.

**History: En. Sec. 2, Ch. 48, Ex. L. 1933; re-en. Sec. 10400.3a, R.C.M. 1935; amd. Sec. 1, Ch. 360, L. 1969; amd. Sec. 1, Ch. 28, L. 1971; amd. Sec. 12, Ch. 365, L. 1974; R.C.M. 1947, 91-4411(e).**

**72-16-911. Tax lien.** Said taxes and interest shall be and remain a lien on the property for a period of 10 years from the date of death, unless sooner paid.

**History: En. Sec. 2, Ch. 48, Ex. L. 1933; re-en. Sec. 10400.3a, R.C.M. 1935; amd. Sec. 1, Ch. 360, L. 1969; amd. Sec. 1, Ch. 28, L. 1971; amd. Sec. 12, Ch. 365, L. 1974; R.C.M. 1947, 91-4411(d).**

**72-16-912. Collection and deposit of tax.** The tax imposed herein shall be collected by the several county treasurers or the department of revenue for deposit with the state treasurer.

**History: En. Sec. 2, Ch. 48, Ex. L. 1933; re-en. Sec. 10400.3a, R.C.M. 1935; amd. Sec. 1, Ch. 360, L. 1969; amd. Sec. 1, Ch. 28, L. 1971; amd. Sec. 12, Ch. 365, L. 1974; R.C.M. 1947, 91-4411(part).**

# CHAPTER 17

# ANATOMICAL GIFT ACT

### Part 1 — General Provisions

Section
72-17-101. Short title.
72-17-102. Definitions.
72-17-103. Uniformity of interpretation.
72-17-104. Chapter subject to autopsy laws.

### Part 2 — Execution and Operation of Anatomical Gift

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72-17-202. Persons who may become donees — permissible purposes of gift.
72-17-203. Rights of donee paramount.
72-17-204. Manner of executing gift — effectiveness.
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72-17-206. Designation of physician by donor — absence of designation.
72-17-207. Gift authorizes examination.
72-17-208. Delivery of document to expedite procedures — delivery not necessary to validity.
72-17-209. Amendment or revocation of gift.
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## Part 1

## General Provisions

**72-17-101. Short title.** This chapter may be cited as the "Uniform Anatomical Gift Act".

**History: En. Sec. 9, Ch. 340, L. 1969; R.C.M. 1947, 69-2323.**

**72-17-102. Definitions.** (1) "Bank or storage facility" means a facility licensed, accredited, or approved under the laws of any state for storage of human bodies or parts thereof.

(2) "Decedent" means a deceased individual and includes a stillborn infant or fetus.

(3) "Donor" means an individual who makes a gift of all or part of his body.

(4) "Hospital" means a hospital licensed, accredited, or approved under the laws of any state; includes a hospital operated by the United States government, a state, or a subdivision thereof, although not required to be licensed under state laws.

(5) "Part" means organs, tissues, eyes, bones, arteries, blood, other fluids, and any other portions of a human body.

(6) "Person" means an individual, corporation, government, or governmental subdivision or agency, business trust, estate, trust, partnership, or association or any other legal entity.

(7) "Physician" or "surgeon" means a physician or surgeon licensed or authorized to practice under the laws of any state.

(8) "State" includes any state, district, commonwealth, territory, insular possession, and any other area subject to the legislative authority of the United States of America.

**History: En. Sec. 1, Ch. 340, L. 1969; R.C.M. 1947, 69-2315.**

**72-17-103. Uniformity of interpretation.** This chapter shall be so construed as to effectuate its general purpose to make uniform the law of those states which enact it.

**History: En. Sec. 8, Ch. 340, L. 1969; R.C.M. 1947, 69-2322.**

**72-17-104. Chapter subject to autopsy laws.** The provisions of this chapter are subject to the laws of this state prescribing powers and duties with respect to autopsies.

**History: En. Sec. 7, Ch. 340, L. 1969; R.C.M. 1947, 69-2321(c).**

## Part 2

## Execution and Operation of Anatomical Gift

**72-17-201. Persons who may make gift — priorities — donee not to accept over objection of prior right.** (1) Any individual of sound mind and 18 years of age or more may give all or any part of his body for any purpose specified in 72-17-202, the gift to take effect upon death.

(2) Any of the following persons, in order of priority stated, when persons in prior classes are not available at the time of death and in the absence of actual notice of contrary indications by the decedent or actual notice of opposition by a member of the same or a prior class, may give all or any part of the decedent's body for any purpose specified in 72-17-202:

(a) the spouse;
(b) an adult son or daughter;
(c) either parent;
(d) an adult brother or sister;
(e) a guardian of the person of the decedent at the time of his death.

(3) The persons authorized by subsection (2) may make the gift after or immediately before death.

(4) If the donee has actual notice of contrary indications by the decedent or that a gift by a member of a class is opposed by a member of the same or a prior class, the donee shall not accept the gift.

**History: En. Sec. 2, Ch. 340, L. 1969; R.C.M. 1947, 69-2316(a) thru (c).**

**72-17-202. Persons who may become donees — permissible purposes of gift.** The following persons may become donees of gifts of bodies or parts thereof for the purposes stated:

(1) any hospital, surgeon, or physician for medical or dental education, research, advancement of medical or dental science, therapy, or transplantation;

(2) any accredited medical or dental school, college, or university for education, research, advancement of medical or dental science, or therapy;

(3) any bank or storage facility for medical or dental education, research, advancement of medical or dental science, therapy, or transplantation; or

(4) any specified individual for therapy or transplantation needed by him.

**History: En. Sec. 3, Ch. 340, L. 1969; R.C.M. 1947, 69-2317.**

**72-17-203. Rights of donee paramount.** The rights of the donee created by the gift are paramount to the rights of others, except as provided by 72-17-104.

**History: En. Sec. 2, Ch. 340, L. 1969; R.C.M. 1947, 69-2316(e).**

**72-17-204. Manner of executing gift — effectiveness.** (1) A gift of all or part of the body under 72-17-201(1) may be made by will. The gift becomes effective upon the death of the testator without waiting for probate. If the will is not probated or if it is declared invalid for testamentary purposes, the gift, to the extent that it has been acted upon in good faith, is nevertheless valid and effective.

(2) A gift of all or part of the body under 72-17-201(1) may also be made by document other than a will. The gift becomes effective upon the death of the donor. The document, which may be a card designed to be carried on the person, must be signed by the donor in the presence of two witnesses who must sign the document in his presence. If the donor cannot sign, the document may be signed for him at his direction and in his presence in the presence of two witnesses who must sign the document in his presence. Delivery of the document of gift during the donor's lifetime is not necessary to make the gift valid.

(3) Any gift by a person designated in 72-17-201(2) shall be made by a document signed by him or made by his telegraphic, recorded telephonic, or other recorded message.

**History: En. Sec. 4, Ch. 340, L. 1969; R.C.M. 1947, 69-2318(a), (b), (e).**

**72-17-205. Specified or unspecified donee — powers and duties of physician.** (1) The gift may be made to a specified donee or without specifying a donee. If the latter, the gift may be accepted by the attending physician as donee upon or following death. If the gift is made to a specified donee who is not available at the time and place of death, the attending physician upon or following death, in the absence of any expressed indication that the donor desired otherwise, may accept the gift as donee.

(2) The physician who becomes a donee under this section shall not participate in the procedures for removing or transplanting a part.

**History: En. Sec. 4, Ch. 340, L. 1969; R.C.M. 1947, 69-2318(c).**

**72-17-206. Designation of physician by donor — absence of designation.** The donor may designate in his will, card, or other document of gift the surgeon or physician to carry out the appropriate procedures, except as provided in 72-17-205 and 72-17-210(2). In the absence of a designation or if the designee is not available, the donee or other person authorized to accept the gift may employ or authorize any surgeon or physician for the purpose, except as provided in 72-17-205 and 72-17-210(2).

**History: En. Sec. 4, Ch. 340, L. 1969; R.C.M. 1947, 69-2318(d).**

**72-17-207. Gift authorizes examination.** A gift of all or part of a body authorizes any examination necessary to assure medical acceptability of the gift for the purposes intended.

**History: En. Sec. 2, Ch. 340, L. 1969; R.C.M. 1947, 69-2316(d).**

**72-17-208. Delivery of document to expedite procedures — delivery not necessary to validity.** (1) If the gift is made by the donor to a specified donee, the will, card, or other document or an executed copy thereof may be delivered to the donee to expedite the appropriate procedures immediately after death. Delivery is not necessary to the validity of the gift.

(2) The will, card, or other document or an executed copy thereof may be deposited in any hospital, bank or storage facility, or registry office that accepts it for safekeeping or for facilitation of procedures after death.

(3) On request of any interested party upon or after the donor's death, the person in possession shall produce the document for examination.

**History: En. Sec. 5, Ch. 340, L. 1969; R.C.M. 1947, 69-2319.**

**72-17-209. Amendment or revocation of gift.** (1) If the will, card, or other document or executed copy thereof has been delivered to a specified donee, the donor may amend or revoke the gift by:

(a) the execution and delivery to the donee of a signed statement;

(b) an oral statement made in the presence of two persons and communicated to the donee;

(c) a statement during a terminal illness or injury addressed to an attending physician and communicated to the donee; or

(d) a signed card or document found on his person or in his effects.

(2) Any document of gift which has not been delivered to the donee may be revoked by the donor in the manner set out in subsection (1) or by destruction, cancellation, or mutilation of the document and all executed copies thereof.

(3) Any gift made by a will may also be amended or revoked in the manner provided for amendment or revocation of wills or as provided in subsection (1).

**History: En. Sec. 6, Ch. 340, L. 1969; R.C.M. 1947, 69-2320.**

**72-17-210. Rights and duties at death.** (1) The donee may accept or reject the gift. If the donee accepts a gift of the entire body, he may, subject to the terms of the gift, authorize embalming and the use of the body in funeral services. If the gift is of a part of the body, the donee, upon the death of the donor and prior to embalming, shall cause the part to be removed without unnecessary mutilation. After removal of the part, custody of the remainder of the body vests in the surviving spouse, next of kin, or other persons under obligation to dispose of the body.

(2) The time of death shall be determined by a physician who tends the donor at his death or, if none, the physician who certifies the death. The physician who tends the donor at his death or, if none, the physician who certifies the death shall not participate in the procedures for removing or transplanting a part.

**History: En. Sec. 7, Ch. 340, L. 1969; R.C.M. 1947, 69-2321(a), (b).**

# CHAPTERS 18 AND 19

## RESERVED

# CHAPTER 20

## TRUSTS IN GENERAL

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72-20-501. Transfer to be in writing.

## Part 1

## Nature and Creation

**72-20-101. Trusts classified.** A trust is either:
(1) voluntary; or
(2) involuntary.

**History: En. Sec. 2950, Civ. C. 1895; re-en. Sec. 5364, Rev. C. 1907; re-en. Sec. 7878, R.C.M. 1921; Cal. Civ. C. Sec. 2215; Field Civ. C. Sec. 1167; re-en. Sec. 7878, R.C.M. 1935; R.C.M. 1947, 86-201.**

**72-20-102. Voluntary trust defined.** A voluntary trust is an obligation arising out of a personal confidence reposed in and voluntarily accepted by one for the benefit of another.

**History: En. Sec. 2951, Civ. C. 1895; re-en. Sec. 5365, Rev. C. 1907; re-en. Sec. 7879, R.C.M. 1921; Cal. Civ. C. Sec. 2216; Field Civ. C. Sec. 1168; re-en. Sec. 7879, R.C.M. 1935; R.C.M. 1947, 86-202.**

**72-20-103. Involuntary trust defined.** An involuntary trust is one which is created by operation of law.

**History: En. Sec. 2952, Civ. C. 1895; re-en. Sec. 5366, Rev. C. 1907; re-en. Sec. 7880, R.C.M. 1921; Cal. Civ. C. Sec. 2217; Field Civ. C. Sec. 1169; re-en. Sec. 7880, R.C.M. 1935; R.C.M. 1947, 86-203.**

**72-20-104. Parties — trustor, trustee, and beneficiary.** The person whose confidence creates the trust is called the trustor; the person in whom confidence is reposed is called the trustee; and the person for whose benefit the trust is created is called the beneficiary.

**History: En. Sec. 2953, Civ. C. 1895; re-en. Sec. 5367, Rev. C. 1907; re-en. Sec. 7881, R.C.M. 1921; Cal. Civ. C. Sec. 2218; Field Civ. C. Sec. 1170; re-en. Sec. 7881, R.C.M. 1935; R.C.M. 1947, 86-204.**

**72-20-105. What constitutes one a trustee.** Every person who voluntarily assumes a relation of personal confidence with another is deemed a trustee, within the meaning of parts 1 through 3, not only as to the person who reposes such confidence but also as to all persons of whose affairs he thus acquires information which was given to such person in the like confidence or over whose affairs he by such confidence obtains any control.

**History: En. Sec. 2954, Civ. C. 1895; re-en. Sec. 5368, Rev. C. 1907; re-en. Sec. 7882, R.C.M. 1921; Cal. Civ. C. Sec. 2219; Field Civ. C. Sec. 1171; re-en. Sec. 7882, R.C.M. 1935; R.C.M. 1947, 86-205.**

**72-20-106. Purpose for which trust may be created.** A trust may be created for any purpose for which a contract may lawfully be made, except as otherwise prescribed by the laws on uses and trusts and on transfers.

**History: En. Sec. 2955, Civ. C. 1895; re-en. Sec. 5369, Rev. C. 1907; re-en. Sec. 7883, R.C.M. 1921; Cal. Civ. C. Sec. 2220; Field Civ. C. Sec. 1172; re-en. Sec. 7883, R.C.M. 1935; R.C.M. 1947, 86-206.**

**72-20-107. Voluntary trust — how created as to trustor.** Subject to the provisions of 72-24-102, a voluntary trust is created, as to the trustor and beneficiary, by any words or acts of the trustor indicating with reasonable certainty:

(1) an intention on the part of the trustor to create a trust; and
(2) the subject, purpose, and beneficiary of the trust.

**History: En. Sec. 2956, Civ. C. 1895; re-en. Sec. 5370, Rev. C. 1907; re-en. Sec. 7884, R.C.M. 1921; Cal. Civ. C. Sec. 2221; Field Civ. C. Sec. 1173; re-en. Sec. 7884, R.C.M. 1935; R.C.M. 1947, 86-207.**

**72-20-108. Voluntary trust — how created as to trustee.** Subject to the provisions of 72-24-102, a voluntary trust is created, as to the trustee, by any words or acts of his indicating with reasonable certainty:
(1) his acceptance of the trust or his acknowledgment, made upon sufficient consideration, of its existence; and
(2) the subject, purpose, and beneficiary of the trust.

**History: En. Sec. 2957, Civ. C. 1895; re-en. Sec. 5371, Rev. C. 1907; re-en. Sec. 7885, R.C.M. 1921; Cal. Civ. C. Sec. 2222; Field Civ. C. Sec. 1174; re-en. Sec. 7885, R.C.M. 1935; R.C.M. 1947, 86-208.**

**72-20-109. Recording of trust instrument — constructive notice.** Declarations of trust and trust agreements, duly executed and acknowledged, and wills creating trusts may be recorded in the office of the county clerk and recorder of the county in which the principal office of the trustee is located and when lands are the subject of the trust may also be recorded in the office of the county clerk and recorder of the county in which the lands are situated, which are the subject of such trust, and when so recorded shall be constructive notice to all persons dealing with the trustees or the trust property of the powers, duties, obligations, limitations, liabilities, and rights of the trustees and beneficiaries thereunder and of all the terms, conditions, and limitations of such declaration of trust, trust agreement, or will.

**History: En. Sec. 1, Ch. 218, L. 1921; re-en. Sec. 7907, R.C.M. 1921; re-en. Sec. 7907, R.C.M. 1935; R.C.M. 1947, 86-406.**

**72-20-110. Involuntary trustee — person wrongfully detaining.** One who wrongfully detains a thing is an involuntary trustee thereof for the benefit of the owner.

**History: En. Sec. 2958, Civ. C. 1895; re-en. Sec. 5372, Rev. C. 1907; re-en. Sec. 7886, R.C.M. 1921; Cal. Civ. C. Sec. 2223; Field Civ. C. Sec. 1175; re-en. Sec. 7886, R.C.M. 1935; R.C.M. 1947, 86-209.**

**72-20-111. Involuntary trust — fraud, mistake, wrongful act.** One who gains a thing by fraud, accident, mistake, undue influence, the violation of a trust, or other wrongful act is, unless he has some other or better right thereto, an involuntary trustee of the thing gained for the benefit of the person who would otherwise have had it.

**History: En. Sec. 2959, Civ. C. 1895; re-en. Sec. 5373, Rev. C. 1907; re-en. Sec. 7887, R.C.M 1921; Cal. Civ. C. Sec. 2224; Field Civ. C. Sec. 1176; re-en. Sec. 7887, R.C.M. 1935; R.C.M. 1947, 86-210.**

## Part 2

## Obligations of Trustee

**72-20-201. Trustee's obligation of good faith.** In all matters connected with his trust, a trustee is bound to act in the highest good faith toward his beneficiary and may not obtain any advantage therein over the latter by the slightest misrepresentation, concealment, threat, or adverse pressure of any kind.

**History: En. Sec. 2970, Civ. C. 1895; re-en. Sec. 5374, Rev. C. 1907; re-en. Sec. 7888, R.C.M. 1921; Cal. Civ. C. Sec. 2228; Field Civ. C. Sec. 1177; re-en. Sec. 7888, R.C.M. 1935; R.C.M. 1947, 86-301.**

**72-20-202. Trustee's influence not to be used for his advantage.** A trustee may not use the influence which his position gives to him to obtain any advantage from his beneficiary.

**History: En. Sec. 2973, Civ. C. 1895; re-en. Sec. 5377, Rev. C. 1907; re-en. Sec. 7891, R.C.M. 1921; Cal. Civ. C. Sec. 2231; Field Civ. C. Sec. 1180; re-en. Sec. 7891, R.C.M. 1935; R.C.M. 1947, 86-304.**

**72-20-203. Trustee not to use property for his own benefit — liability.** (1) A trustee may not use or deal with the trust property for his own benefit or for any other purpose unconnected with the trust in any manner.

(2) A trustee who uses or disposes of the trust property contrary to subsection (1) may, at the option of the beneficiary, be required to account for all profits so made or to pay the value of its use and, if he has disposed thereof, to replace it with its fruits or to account for its proceeds with interest.

**History: En. Secs. 2971, 2979, Civ. C. 1895; re-en. Secs. 5375, 5383, Rev. C. 1907; re-en. Secs. 7889, 7897, R.C.M. 1921; Cal. Civ. C. Secs. 2229, 2237; Field Civ. C. Secs. 1178, 1186; re-en. Secs. 7889, 7897, R.C.M. 1935; R.C.M. 1947, 86-302, 86-310.**

**72-20-204. Conflict of interest prohibited — exceptions.** Neither a trustee nor any of his agents may take part in any transaction concerning the trust in which he or anyone for whom he acts as agent has an interest, present or contingent, adverse to that of this beneficiary, except as follows:

(1) when the beneficiary, having capacity to contract, with full knowledge of the motives of the trustee and of all other facts concerning the transaction which might affect his own decision and without the use of any influence on the part of the trustee, permits him to do so;

(2) when the proper court, upon the like information of the facts, grants the like permission, the beneficiary not having capacity to contract; or

(3) when some of the beneficiaries, having capacity to contract and some not having it, the former grant permission for themselves and the proper court for the latter, in the manner above prescribed.

**History: En. Sec. 2972, Civ. C. 1895; re-en. Sec. 5376, Rev. C. 1907; re-en. Sec. 7890, R.C.M. 1921; Cal. Civ. C. Sec. 2230; Based on Field Civ. C. Sec. 1179; re-en. Sec. 7890, R.C.M. 1935; R.C.M. 1947, 86-303.**

**72-20-205. Trustee not to assume adverse trust.** No trustee, so long as he remains in the trust, may undertake another trust adverse in its nature to the interest of his beneficiary in the subject of the trust without the consent of the latter.

**History: En. Sec. 2974, Civ. C. 1895; re-en. Sec. 5378, Rev. C. 1907; re-en. Sec. 7892, R.C.M. 1921; Cal. Civ. C. Sec. 2232; Field Civ. C. Sec. 1181; re-en. Sec. 7892, R.C.M. 1935; R.C.M. 1947, 86-305.**

**72-20-206. Duty to disclose adverse interest.** If a trustee acquires any interest or becomes charged with any duty adverse to the interest of his beneficiary in the subject of the trust, he must immediately inform the latter thereof and may be at once removed.

**History: En. Sec. 2975, Civ. C. 1895; re-en. Sec. 5379, Rev. C. 1907; re-en. Sec. 7893, R.C.M. 1921; Cal. Civ. C. Sec. 2233; Field Civ. C. Sec. 1182; re-en. Sec. 7893, R.C.M. 1935; R.C.M. 1947, 86-306.**

**72-20-207. Violation of obligations as fraud.** Every violation of the provisions of the preceding sections of this chapter is a fraud against the beneficiary of the trust.

**History: En. Sec. 2976, Civ. C. 1895; re-en. Sec. 5380, Rev. C. 1907; re-en. Sec. 7894, R.C.M. 1921; Cal. Civ. C. Sec. 2234; Field Civ. C. Sec. 1183; re-en. Sec. 7894, R.C.M. 1935; R.C.M. 1947, 86-307.**

**72-20-208. Presumption against trustees.** All transactions between a trustee and his beneficiary during the existence of the trust or while the influence acquired by the trustee remains by which he obtains any advantage from his beneficiary are presumed to be entered into by the latter without sufficient consideration and under undue influence.

**History: En. Sec. 2977, Civ. C. 1895; re-en. Sec. 5381, Rev. C. 1907; re-en. Sec. 7895, R.C.M. 1921; Cal. Civ. C. Sec. 2235; Field Civ. C. Sec. 1184; re-en. Sec. 7895, R.C.M. 1935; R.C.M. 1947, 86-308.**

**72-20-209. Trustee mingling trust property with his own.** A trustee who willfully and unnecessarily mingles the trust property with his own so as to constitute himself in appearance its absolute owner is liable for its safety in all events.

**History: En. Sec. 2978, Civ. C. 1895; re-en. Sec. 5382, Rev. C. 1907; re-en. Sec. 7896, R.C.M. 1921; Cal. Civ. C. Sec. 2236; Field Civ. C. Sec. 1185; re-en. Sec. 7896, R.C.M. 1935; R.C.M. 1947, 86-309.**

**72-20-210. Measure of liability for unauthorized but good faith use or disposal of trust property.** A trustee who uses or disposes of the trust property in any manner not authorized by the trust but in good faith and with intent to serve the interests of the beneficiary is liable only to make good whatever is lost to the beneficiary by his error.

**History: En. Sec. 2980, Civ. C. 1895; re-en. Sec. 5384, Rev. C. 1907; re-en. Sec. 7898, R.C.M. 1921; Cal. Civ. C. Sec. 2238; Field Civ. C. Sec. 1187; re-en. Sec. 7898, R.C.M. 1935; R.C.M. 1947, 86-311.**

**72-20-211. Cotrustees — how far liable for each other.** A trustee is responsible for the wrongful acts of a cotrustee to which he consented or which by his negligence he enabled the latter to commit but for no others.

**History: En. Sec. 2981, Civ. C. 1895; re-en. Sec. 5385, Rev. C. 1907; re-en. Sec. 7899, R.C.M. 1921; Cal. Civ. C. Sec. 2239; Field Civ. C. Sec. 1188; re-en. Sec. 7899, R.C.M. 1935; R.C.M. 1947, 86-312.**

## Part 3

## Rights and Duties of Third Persons

**72-20-301. Third person transferee — when involuntary trustee.** Everyone to whom property is transferred in violation of a trust holds the same as an involuntary trustee under such trust, unless he purchased it in good faith and for a valuable consideration.

**History: En. Sec. 2990, Civ. C. 1895; re-en. Sec. 5386, Rev. C. 1907; re-en. Sec. 7900, R.C.M. 1921; Cal. Civ. C. Sec. 2243; Field Civ. C. Sec. 1189; re-en. Sec. 7900, R.C.M. 1935; R.C.M. 1947, 86-313.**

**72-20-302. Third person transferor — when must see to application of trust property.** One who actually and in good faith transfers any money or other property to a trustee, as such, is not bound to see to the application thereof, and his rights can in no way be prejudiced by a misapplication thereof by the trustee. Other persons must, at their peril, see to the proper application of money or other property paid or delivered by them.

**History: En. Sec. 2991, Civ. C. 1895; re-en. Sec. 5387, Rev. C. 1907; re-en. Sec. 7901, R.C.M. 1921; Cal. Civ. C. Sec. 2244; Field Civ. C. Sec. 1190; re-en. Sec. 7901, R.C.M. 1935; R.C.M. 1947, 86-314.**

## Part 4

## Trustee Accounts

**72-20-401. Application of part.** This part shall not apply to resulting trusts, constructive trusts, business trusts where certificates of beneficial interest are issued to the beneficiaries, investment trusts, voting trusts, insurance trusts prior to the death of the insured, trusts in the nature of mortgages or pledges, trusts created by judgment or decree of a federal court or of the district court when not sitting in probate, liquidation trusts, or trusts for the sole purpose of paying dividends, interest or interest coupons, salaries, wages, or pensions; nor shall this part apply to executors, administrators, or guardians.

**History: En. Sec. 1, Ch. 24, L. 1969; R.C.M. 1947, 86-513(part).**

**72-20-402. Waiver of accounts — additional duties in instrument.** (1) The settlor of any trust governed by this part may waive any or all of the provisions of this part requiring periodical statements to beneficiaries or may add additional duties in the instrument creating the trust.

(2) Any beneficiary entitled to an accounting under this part may waive such an accounting by a separate instrument delivered to the trustee or trustees.

**History: En. Sec. 1, Ch. 24, L. 1969; R.C.M. 1947, 86-513(part).**

**72-20-403. Annual statement to income beneficiary required.** The trustee or trustees appointed by any will, deed, or agreement executed before or after July 1, 1969, shall mail or deliver at least annually to each income trust beneficiary a written itemized statement of all current receipts and disbursements made by the trustee of the funds of the trust, both principal and income, and upon the request of any such beneficiary shall furnish him an itemized statement of all property then held by such trustee and may also file any such statement in the district court of the county in which the trustee or one of the trustees resides.

**History: En. Sec. 1, Ch. 24, L. 1969; R.C.M. 1947, 86-513(part).**

**72-20-404. Permissive accounts — intermediate — final.** (1) In addition to the statements provided for in 72-20-403, any such trustee or trustees, whenever it or they so desire, may file in the district court of the county in which the trustees or one of the trustees resides an intermediate account under oath showing:

(a) the period covered by the account;

(b) the total principal with which the trustee is chargeable according to the last preceding account or the inventory if there is no preceding account;

(c) an itemized statement of all principal funds received and disbursed during such period;

(d) an itemized statement of all income received and disbursed during such period, unless waived;

(e) the balance of such principal and income remaining at the close of such period and how invested;

(f) the names and addresses of all living beneficiaries, including contingent beneficiaries, of the trust and a statement as to any such beneficiary known to be under legal disability;

(g) a description of any possible unborn or unascertained beneficiary and his interest in the trust fund.

(2) In addition thereto, after the time for termination of the trust shall have arrived, the trustee or trustees may file a final account in similar manner.

**History: En. Sec. 1, Ch. 24, L. 1969; R.C.M. 1947, 86-513(part).**

**72-20-405. Account upon petition of settlor or beneficiary.** Upon the petition of any settlor or of any beneficiary of such a trust, after due notice thereof to the trustee, the district court in the county where the trustee or one of the trustees resides may direct the trustee or trustees thereof to file in said court such an account at any time subsequent to 1 year from the day on which such a report was last filed or, if none, then after 1 year from the inception of the trust.

**History: En. Sec. 1, Ch. 24, L. 1969; R.C.M. 1947, 86-513(part).**

**72-20-406. Notice of account filing and return day.** (1) When any such account shall have been filed, the clerk of the court where filed shall fix a return day therefor and issue a notice as provided for herein. If each of the beneficiaries and the guardians and guardians ad litem, if any, is personally served with a copy of the notice, whether within or outside the state of Montana, at least 25 days prior to the return day, then no publication of the notice shall be required; otherwise the trustee or trustees shall cause notice as provided for herein to be given by publishing the same at least once a week for 3 successive weeks preceding the return day, the first publication to be at least 25 days preceding the return day, such publication to be in a newspaper of general circulation in the county or, if none, then in an adjoining county. In any event, at least 25 days prior to the return day a copy of the notice shall be either served upon each beneficiary not represented by guardian or guardian ad litem or mailed to each such beneficiary not so served at such beneficiary's address last known to the trustee and shall be either served upon each guardian and guardian ad litem or mailed to each such guardian and guardian ad litem not so served at such guardian's or guardian ad litem's address last known to the trustee.

(2) Proof of service of the notice may be made by affidavit, as provided for service of summons in civil actions, or by written admission of service signed by the person served.

(3) The notice shall state:

(a) the time and place for the return day;

(b) the name or names of the trustee or trustees who have filed the account;

(c) that the account has been filed;

(d) that the court is asked to settle such account; and

(e) that any objections or exceptions thereto must be filed with the clerk of said court on or before such return day.

**History: En. Sec. 1, Ch. 24, L. 1969; R.C.M. 1947, 86-513(part).**

**72-20-407. Objections to account — hearing — decree.** (1) Upon or before the return day, any beneficiary of the trust may file his written objections or exceptions to the account filed or to any action of the trustee or trustees set forth therein.

(2) The court may appoint either the legal guardian of a beneficiary or a guardian ad litem to represent the interest of any such beneficiary who is an infant or of unsound mind or otherwise legally incompetent or who is yet unborn or unascertained, and such beneficiary shall be bound by any action taken by such representative. Every unborn or unascertainable beneficiary shall be concluded by any action taken by the court for or against any living beneficiary of the same class or whose interests are similar to the interests of such unborn or unascertainable beneficiary.

(3) At the same time or at some later day fixed by the court if so requested by one or more of the parties, the court, without the intervention of a jury and after hearing all the evidence submitted, shall determine the correctness of the account and the validity and propriety of all actions of the trustee or trustees set forth therein, including the purchase, retention, and disposition of any of the property and funds of the trust and shall render its decree either approving or disapproving the same or any part thereof and, in addition, may surcharge the trustee or trustees for all losses, if any, caused by negligent or willful breaches of trust.

**History: En. Sec. 1, Ch. 24, L. 1969; R.C.M. 1947, 86-513(part).**

**72-20-408. Final nature of decree.** The decree so rendered shall be deemed final, conclusive, and binding upon all the parties interested, including all incompetent, unborn, and unascertained beneficiaries of the trust, subject only to the right of appeal hereinafter stated.

**History: En. Sec. 1, Ch. 24, L. 1969; R.C.M. 1947, 86-513(part).**

**72-20-409. Appeal.** The decree so rendered shall be a final order from which any party in interest may appeal as in civil actions to the district court of the state of Montana.

**History: En. Sec. 1, Ch. 24, L. 1969; R.C.M. 1947, 86-513(part).**

## Part 5

## Transfer of Interest in Trust

**72-20-501. Transfer to be in writing.** An interest in an existing trust can be transferred only by operation of law or by a written instrument, subscribed by the person making the transfer or by his agent.

**History: En. Sec. 1530, Civ. C. 1895; re-en. Sec. 4630, Rev. C. 1907; re-en. Sec. 6877, R.C.M. 1921; Cal. Civ. C. Sec. 1135; Based on Field Civ. C. Sec. 495; re-en. Sec. 6877, R.C.M. 1935; R.C.M. 1947, 67-1701.**

# CHAPTER 21

# TRUSTEES' POWERS ACT

### Part 1 — General Provisions

Section

72-21-101. Short title.
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72-21-103. Uniformity of construction.
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### Part 2 — Trustees' Powers—Limitations

72-21-201. Limitation of powers by trust instrument — incorporation by reference.
72-21-202. Powers of trustee.
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72-21-204. Court authorization — relief from restriction on power — conflict of interest.
72-21-205. Transfer of office prohibited.
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## Part 1

## General Provisions

**72-21-101. Short title.** This chapter may be cited as the "Montana Trustees' Powers Act".

**History: En. 86-910 by Sec. 9, Ch. 297, L. 1974; R.C.M. 1947, 86-910.**

**72-21-102. Applicability.** Except as specifically provided in the trust, the provisions of this chapter apply to any trust established after March 25, 1974, and to any trust asset acquired by the trustee after March 25, 1974.

**History: En. 86-908 by Sec. 7, Ch. 297, L. 1974; R.C.M. 1947, 86-908.**

**72-21-103. Uniformity of construction.** This chapter shall be construed to effectuate its general purpose to make uniform the law of those states which enact it.

**History: En. 86-909 by Sec. 8, Ch. 297, L. 1974; R.C.M. 1947, 86-909.**

**72-21-104. Definitions — prudent man standard.** As used in this chapter, the following definitions apply:

(1) "Trust" means an express trust created by a trust instrument, including a will, whereby a trustee has the duty to administer a trust asset for the benefit of a named or otherwise described income or principal beneficiary or both. "Trust" does not include a resulting or constructive trust, a business trust which provides for certificates to be issued to the beneficiary, an investment trust, a voting trust, a security instrument, a trust created by the judgment or decree of a court not sitting in probate, a liquidation trust, or a trust for the primary purpose of paying dividends, interests, interest coupons, salaries, wages, pensions or profits, or employee benefits of any kind, an instrument wherein a person is nominee or escrowee for another, a trust created in deposits in any financial institution, or other trust the nature of which does not admit of general trust administration.

(2) "Trustee" means an original, added, or successor trustee.

(3) "Prudent man" means a trustee who in investing, reinvesting, purchasing, acquiring, selling, and managing property for another shall exercise the judgment and care under the circumstances then prevailing which men of prudence, discretion, and intelligence exercise in the management of their own affairs, not in regard to speculation but in regard to the permanent disposition of their funds, considering the probable income as well as the probable safety of their capital. Within the limitations of the foregoing standard and subject to any express provisions or limitations contained in any particular trust instrument, a trustee is authorized to acquire every kind of property, real, personal, or mixed, and every kind of investment, specifically including, but not by way of limitation, corporate obligations of every kind and stocks, preferred or common, which men of prudence, discretion, and intelligence acquire for their own account.

**History: En. 86-902 by Sec. 1, Ch. 297, L. 1974; R.C.M. 1947, 86-902.**

## Part 2

## Trustees' Powers — Limitations

**72-21-201. Limitation of powers by trust instrument — incorporation by reference.** (1) The trustee has all powers conferred upon him by the provisions of this chapter unless limited in the trust instrument.

(2) An instrument which is not a trust under 72-21-104 (1) may incorporate any part of this chapter by reference.

**History: En. 86-903 by Sec. 2, Ch. 297, L. 1974; R.C.M. 1947, 86-903.**

**72-21-202. Powers of trustee.** (1) From time of creation of the trust until final distribution of the assets of the trust, a trustee has the power to perform, without court authorization, every act which a prudent man would perform for the purposes of the trust, including but not limited to the powers specified in subsection (2).

(2) A trustee has the power, subject to subsection (1) of this section and to 72-21-203:

(a) to collect, hold, and retain trust assets received from a trustor until, in the judgment of the trustee, disposition of the assets should be made; and the assets may be retained even though they include an asset in which the trustee is personally interested or which is not otherwise a qualified investment;

(b) to receive additions to the assets of the trust from any source;

(c) to continue or participate in the operation of any business or other enterprise and to effect incorporation, dissolution, or other change in the form of the organization of the business or enterprise;

(d) to acquire an undivided interest in a trust asset in which the trustee, in any trust capacity, holds an undivided interest;

(e) to invest and reinvest trust assets in accordance with the provisions of the trust or as provided by law;

(f) to deposit trust funds in a bank, including a bank operated by the trustee;

(g) to acquire or dispose of an asset, for cash or on credit, at public or private sale; and to manage, develop, improve, exchange, partition, change the character of, or abandon a trust asset or any interest therein; and to encumber, mortgage, or pledge a trust asset for a term within or extending beyond the term of the trust, in connection with the exercise of any power vested in the trustee;

(h) to make ordinary or extraordinary repairs or alterations in buildings or other structures, to demolish any improvements, to raze existing or erect new party walls or buildings;

(i) to subdivide, develop, or dedicate land to public use; or to make or obtain the vacation of plats and adjust boundaries; or to adjust differences in valuation on exchange or partition by giving or receiving consideration; or to dedicate easements to public use without consideration;

(j) to enter for any purpose into a lease as lessor or lessee, with or without option to purchase or renew, for a term within or extending beyond the term of the trust;

(k) to enter into a lease or arrangement for exploration and removal of minerals or other natural resources or enter into a pooling or unitization agreement;

(l) to grant an option involving disposition of a trust asset, or to take an option for the acquisition of any asset;

(m) to vote a security, in person or by general or limited proxy, and enter into voting trusts;

(n) to pay calls, assessments, and any other sums chargeable or accruing against or on account of securities;

(o) to sell or exercise stock subscription or conversion rights; to consent, directly or through a committee or other agent, to the reorganization, consolidation, merger, dissolution, or liquidation of a corporation or other business enterprise and retain any property received pursuant thereto;

(p) to hold a security in the name of a nominee or in other form without disclosure of the trust so that title to the security may pass by delivery, but the trustee is liable for any act of the nominee in connection with the stock so held;

(q) to insure the assets of the trust against damage or loss and the trustee against liability with respect to third persons;

(r) to borrow money from any source to be repaid from trust assets or otherwise; to advance money for the protection of the trust and for all expenses, losses, and liability sustained in the administration of the trust or because of the holding or ownership of any trust assets, for which advances with any interest the trustee has a lien on the trust assets as against the beneficiary;

(s) to pay or contest any claim; to settle a claim by or against the trust by compromise, arbitration, or otherwise; and to release, in whole or in part, any claim belonging to the trust to the extent that the claim is uncollectible;

(t) to pay taxes, assessments, compensation of the trustee, and other expenses incurred in the collection, care, administration, and protection of the trust;

(u) to allocate items of income or expense to either trust income or principal, as provided by law, including creation of reserves out of income for depreciation, obsolescence, or amortization or for depletion in mineral or timber properties;

(v) to pay any property distributable to a beneficiary under disability, without liability to the trustee, to the beneficiary or for use of the beneficiary either to his parent, his guardian, person with whom he resides, or others;

(w) to effect distribution of property and money in divided or undivided interests and to adjust resulting differences in valuation;

(x) to employ persons, including attorneys, auditors, investment advisors, or agents, even if they are associated with the trustee, to advise or assist the trustee in the performance of his administrative duties;

(y) to prosecute or defend actions, claims, or proceedings for the protection of trust assets and of the trustee in the performance of his duties;

(z) to execute and deliver all instruments which will accomplish or facilitate the exercise of the powers vested in the trustee.

**History: En. 86-904 by Sec. 3, Ch. 297, L. 1974; R.C.M. 1947, 86-904(1), (3).**

**72-21-203. Duty to act as fiduciary.** In the exercise of his powers, including the powers granted by this chapter, a trustee has a duty to act with due regard to his obligation as a fiduciary.

**History: En. 86-904 by Sec. 3, Ch. 297, L. 1974; R.C.M. 1947, 86-904(2).**

**72-21-204. Court authorization — relief from restriction on power — conflict of interest.** (1) This chapter does not affect the power of a court of competent jurisdiction, for cause shown and upon petition of the trustee or affected beneficiary and upon appropriate notice to the affected parties, to relieve a trustee from any restrictions on his power that would otherwise be placed upon him by the trust or by this chapter.

(2) If the duty of the trustee and his individual interest or his interest as trustee of another trust conflict in the exercise of a trust power, the power may be exercised only by court authorization, except as provided in 72-21-202(2)(a), (d), (f), (r), and (x), upon petition of the trustee. Under this section, personal profit or advantage to an affiliated or subsidiary company or association is personal profit to any corporate trustee.

**History: En. 86-906 by Sec. 5, Ch. 297, L. 1974; R.C.M. 1947, 86-906.**

**72-21-205. Transfer of office prohibited.** Except as provided in 32-1-807 and 32-1-808, the trustee shall not transfer his office to another or delegate the entire administration of the trust to a cotrustee or another.

**History: En. 86-905 by Sec. 4, Ch. 297, L. 1974; amd. Sec. 9, Ch. 401, L. 1975; R.C.M. 1947, 86-905.**

**72-21-206. Multiple trustees.** (1) Any power vested in three or more trustees may be exercised by a majority, but a trustee who has not joined in exercising a power is not liable to the beneficiaries or to others for the consequences of the exercise.

(2) If two or more trustees are appointed to perform a trust and if any of them are unable or refuse to accept the appointment or, having accepted, cease to be trustees, the surviving or remaining trustees shall perform the trust and succeed to all the powers, duties, and discretionary authority given to the trustees jointly.

(3) This section does not excuse a cotrustee from liability for failure either to participate in the administration of the trust or to attempt to prevent a breach of trust.

**History: En. 86-907 by Sec. 6, Ch. 297, L. 1974; R.C.M. 1947, 86-907.**

# CHAPTER 22

## CONVEYANCE OF TRUST PROPERTY BY COURT ORDER

### Part 1 — Rights, Powers, and Duties

Section
72-22-101. Conveyance in contravention of trust instrument void — exception.
72-22-102. Power of court to order conveyance generally — when.
72-22-103. Power of court to order lease — covenant to pay for improvements.
72-22-104. Mineral lease.
72-22-105. Payor of proceeds not responsible for proper application.

### Part 2 — Procedure

72-22-201. Venue.
72-22-202. Petition — contents — filing.
72-22-203. Fixing of time and place of hearing.
72-22-204. Notice of hearing — service — publication.

72-22-205. Unknown heirs or devisees — designation as defendants.
72-22-206. Minors and persons of unsound mind — service on guardian.
72-22-207. Hearing — final order.
72-22-208. Court confirmation of disposition required — conveyance — proceeds.
72-22-209. Validity of final order and conveyance pursuant thereto.
72-22-210. Effect of final order on unknown persons.

## Part 1

## Rights, Powers, and Duties

**72-22-101. Conveyance in contravention of trust instrument void — exception.** When any trust is expressed in the instrument creating the trust estate, every sale, conveyance, or other act of the trustee in contravention of the instrument creating the trust shall be absolutely void, except as in this chapter provided.

**History: En. Sec. 1, Ch. 265, L. 1947; R.C.M. 1947, 86-315(part).**

**72-22-102. Power of court to order conveyance generally — when.** The district court of the county wherein the property, whether real or personal, or any part thereof held in trust is situate may by order, on such terms and conditions as seem just and proper, authorize and direct any trustee, whether it be a trust created by writing or otherwise, to sell or otherwise dispose of or lease the property for the development of its mineral resources or mortgage all or any part of such trust property, whether real or personal, whenever it appears to the satisfaction of the court that it is necessary, advisable, or for the benefit or for the best interest of the trust estate or of the person or persons beneficially interested therein holding the first and present estate, interest, or use and that it will do no substantial injury to the heirs or next of kin or others in succession, expectancy, reversion, or remainder or the beneficiaries, in respect of such property.

**History: En. Sec. 1, Ch. 265, L. 1947; R.C.M. 1947, 86-315(part).**

**72-22-103. Power of court to order lease — covenant to pay for improvements.** The district court may by order, on such terms and conditions as seem to it just and proper, authorize such trustee to lease such property for a term exceeding 5 years, if it appears to the satisfaction of the court that it is for the best interest of the trust estate or the beneficiaries thereof and may authorize such trustee to covenant in the lease to pay, at the end of the term or any renewal term, to the lessee the then fair and reasonable value of any buildings and improvements which may have been erected or placed on the leased premises during such term or renewal term.

**History: En. Sec. 2, Ch. 265, L. 1947; R.C.M. 1947, 86-316.**

**72-22-104. Mineral lease.** The district court may by order, on such terms and conditions as may be just and proper, authorize such trustee to lease such property for the purpose of developing the mineral resources of the same for a term of years under the usual terms and conditions and under such terms and conditions as to the court may seem just and equitable.

**History: En. Sec. 3, Ch. 265, L. 1947; R.C.M. 1947, 86-317.**

**72-22-105. Payor of proceeds not responsible for proper application.** Any person who shall actually and in good faith pay to any such trustee any money or other proceeds derived from the sale or other disposition or from the mortgaging or leasing of such trust property or any part thereof shall not be responsible for the proper application of such money or other proceeds in accordance with the terms of the trust; and any right, title, or interest derived from such trustee by such person, in consideration of such payment, shall not be impeached or called in question in consequence of any misapplication by such trustee of such money or proceeds so paid.

**History: En. Sec. 12, Ch. 265, L. 1947; R.C.M. 1947, 86-326.**

## Part 2

## Procedure

**72-22-201. Venue.** All actions brought under this chapter must be brought in the county in which the real estate or a portion thereof is situated; provided, that if said real estate is situated in more than one county, said action may be brought or procured in either of said counties and a transcript of the original judgment, certified by the clerk of the court, shall be filed in the office of the clerk of the court in the county other than the one in which said action was brought in which any part of the real estate affected thereby is situated.

**History: En. Sec. 5, Ch. 265, L. 1947; R.C.M. 1947, 86-319.**

**72-22-202. Petition — contents — filing.** (1) Application to the court for an order to sell or otherwise dispose of or mortgage such trust property, real or personal, or any part thereof or to lease such trust property, real or personal, or any part thereof shall be by duly verified petition made by such trustee or any person beneficially interested in such property.

(2) Such petition shall set forth:

(a) the nature of the trust estate;

(b) the particular facts making it necessary or proper for the application to be granted;

(c) a description of the trust property to be sold or otherwise disposed of or mortgaged or leased and the interest of the petitioner therein; and

(d) if said order is petitioned for on the ground that it is for the advantage, best interest, and benefit of the trust estate and those interested therein, including minor heirs, if any, that the order be made, in addition to the foregoing facts, in what way an advantage or benefit would accrue to the trust estate or to those interested therein by the granting of such an order prayed for.

(3) Such petition and the notice of hearing thereof shall set forth, so far as appears of record or as known to the petitioner, the names of the beneficiaries and those interested in said trust, and in addition such petition shall set out the places of residence of all persons who have any right, title, interest, estate, or lien and the nature thereof in or upon the trust property or who, by the terms of the instrument creating the trust, are known to the petitioner to have an interest in said trust property. If there be persons having or claiming to have or who at any time thereafter may have any interest in the trust property whose names are unknown, it shall be lawful to include such persons in such petition and the notice of hearing thereof by the name and description of unknown persons interested in the trust property, and to that end such petition and notice, in addition to setting out the names of the persons aforesaid, may contain the following: "and any and all persons, known or unknown, claiming or who might claim any right, title, estate, or

interest in or to or any lien or encumbrance upon the real estate in the petition described or any part thereof, whether such claim or possible claim be present or contingent, including any claim or possible claim of dower, inchoate or accrued".

(4) Such petition, together with a copy annexed thereto of the deed, will, or other written instrument creating the trust estate, if any, shall be filed in the office of the clerk of the district court of the county wherein such property or some part thereof is situate.

**History: En. Sec. 4, Ch. 265, L. 1947; R.C.M. 1947, 86-318(part).**

**72-22-203. Fixing of time and place of hearing.** Upon the filing of any such petition, the district court shall by order fix a time and place of hearing the same. Such hearing may be at chambers or at a general or special term of the court wherein the proceedings are pending.

**History: En. Sec. 4, Ch. 265, L. 1947; R.C.M. 1947, 86-318(part).**

**72-22-204. Notice of hearing — service — publication.** (1) Notice of such hearing stating the time and place thereof and the objects of the petition shall be served upon all persons named in the petition as having any right, title, interest, estate, or lien in or upon the trust property or who, by the terms of the instrument creating such trust, may at any time thereafter have any such right, title, interest, estate, or lien.

(2) When the person on whom the notice of hearing is to be served resides out of the state or has departed from the state or cannot, after due diligence, be found within the state or conceals himself to avoid the service of notice of hearing or when the defendant is a foreign corporation having no managing or business agent, cashier, secretary, or other officer within the state and an affidavit stating any of these facts is filed with the clerk of the court in which the action is brought and such affidavit also states that a cause of action exists against the defendant in respect to whom the service of notice of hearing is to be made and that he or it is a necessary or proper party to the action, the clerk of the court in which the action is commenced shall cause the service of notice of hearing to be made by publication thereof. Such notice shall be served in the same manner as a summons in a civil action, except that publication thereof shall be made for 2 consecutive weeks in a regularly published newspaper of general circulation in the county wherein such proceedings are pending, or if no such newspaper be published in such county, the publication may be made in such newspaper published in an adjoining county. Service of such notice may be had upon all persons named and described in such petition and notice as unknown persons interested in the trust property by publication of such notice in the same manner and for the same time as in the case of nonresidents whose names are set out in the petition, upon the filing in said court of an affidavit by the petitioner, his agent or attorney stating that there are or that affiant is informed or believes there are certain persons, in addition to those whose names are set out in such petition, who have or claim to have or may have some right, title, interest, estate, or lien in or upon the trust property the nature of which is, as well as the names and places of whom are, to affiant unknown.

**History: En. Sec. 6, Ch. 265, L. 1947; R.C.M. 1947, 86-320.**

**72-22-205. Unknown heirs or devisees — designation as defendants.** (1) When persons are made defendant by the style and description of unknown heirs, there shall be added to such designation of them the name of the deceased person of whom they shall be claimed or supposed to be the heirs.

(2) When persons are made defendant by the style and description of unknown devisees, there shall be added to such designation the name of the deceased person of whom they shall be claimed or supposed to be devisees.

**History: En. Sec. 7, Ch. 265, L. 1947; R.C.M. 1947, 86-321.**

**72-22-206. Minors and persons of unsound mind — service on guardian.** In case any person whose name is set out in such petition is a minor or a person of unsound mind, such notice of hearing shall be served upon the duly appointed guardian or other legal representative of such person, if any. If there be none, then the district court in which such proceedings are pending shall appoint any competent person as a guardian ad litem for such person and may compel the person so appointed to act. In such case, service of such notice of hearing shall be had by service on such guardian ad litem.

**History: En. Sec. 8, Ch. 265, L. 1947; R.C.M. 1947, 86-322.**

**72-22-207. Hearing — final order.** (1) Upon proof being filed of the service of such notice, the court at the time and place therein fixed or to which the hearing may be adjourned shall hear all competent evidence offered for and against the granting of such petition, regulating the order of proof as it may deem best, and shall make and enter a final order upon the application.

(2) If the application is granted, the final order shall authorize the sale or other disposition or the mortgaging or leasing, as the case may be, of such trust property or part thereof in the manner and upon such terms as the court may prescribe.

**History: En. Sec. 9, Ch. 265, L. 1947; R.C.M. 1947, 86-323(part).**

**72-22-208. Court confirmation of disposition required — conveyance — proceeds.** (1) Any such sale or other disposition or mortgaging or leasing of such trust property by such trustee shall be reported to the court for confirmation and confirmed by the court before the same shall become effective and valid.

(2) Upon such confirmation, such trustee shall make, execute, and deliver, subject to such terms and conditions as the court in its order of confirmation may impose, good and sufficient instruments of conveyance, assignment, and transfer or mortgage or lease, as the case may be.

(3) On receipt by such trustee of the money or other proceeds derived from any such sale or other disposition or mortgaging or leasing of such trust property, such money or other proceeds shall be held, administered, distributed, or otherwise dealt with by such trustee under and pursuant to the terms of the deed, will, or other written instrument creating a trust. Then the court shall, by order and judgment, direct the distribution and administration of such funds or property.

**History: En. Sec. 9, Ch. 265, L. 1947; R.C.M. 1947, 86-323(part).**

**72-22-209. Validity of final order and conveyance pursuant thereto.** The final order of the court in such proceedings and every deed or other instrument of conveyance, assignment, transfer, mortgage, or lease made, executed, and delivered by such trustee pursuant to any such final order shall be valid and effectual against all persons whose names are set out in such petition and all persons therein named and described as unknown persons interested in the trust property served with notice of hearing as in this chapter provided or appearing voluntarily in the proceedings and consenting to the granting of such order, whether such persons or any of them are in being or not in being, and whatever the nature of their interest and estate in the trust property, whether vested or contingent, in expectancy, in reversion, or in remainder or otherwise at the time of the granting of such order.

**History: En. Sec. 11, Ch. 265, L. 1947; R.C.M. 1947, 86-325.**

**72-22-210. Effect of final order on unknown persons.** The final order of the court in such proceedings made or had with respect to such unknown persons shall have the same effect and be as binding and conclusive upon them as though they had been named and described in such petition and notice by their proper names; provided, that all such unknown persons so served as in this chapter provided shall have the same right to appear and object to such order and the granting thereof, after such order has been made and entered, as persons would have who are named and described by their proper names in such petition and notice and have been served with such notice by publication, as provided in this chapter.

**History: En. Sec. 10, Ch. 265, L. 1947; R.C.M. 1947, 86-324.**

# CHAPTER 23

## TRUSTS FOR BENEFIT OF THIRD PERSONS

### Part 1 — General Provisions

Section
72-23-101. Applicability of chapter.

### Part 2 — Nature and Creation

72-23-201. Creation of trust.
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72-23-203. Declaration of trust.
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72-23-508. Court to appoint trustees — when.

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## Part 1

## General Provisions

**72-23-101. Applicability of chapter.** The provisions of this chapter apply only to express trusts created for the benefit of another than the trustor and in which the title to the trust property is vested in the trustee; not including, however, those of executors, administrators, and guardians, as such.

**History: En. Sec. 3000, Civ. C. 1895; re-en. Sec. 5388, Rev. C. 1907; re-en. Sec. 7902, R.C.M. 1921; Cal. Civ. C. Sec. 2250; Field Civ. C. Sec. 1191; re-en. Sec. 7902, R.C.M. 1935; R.C.M. 1947, 86-401.**

## Part 2

## Nature and Creation

**72-23-201. Creation of trust.** The mutual consent of a trustor and trustee creates a trust of which the beneficiary may take advantage at any time prior to its rescission.

**History: En. Sec. 3001, Civ. C. 1895; re-en. Sec. 5389, Rev. C. 1907; re-en. Sec. 7903, R.C.M. 1921; Cal. Civ. C. Sec. 2251; Field Civ. C. Sec. 1192; re-en. Sec. 7903, R.C.M. 1935; R.C.M. 1947, 86-402.**

**72-23-202. Court appointed trustee — court as trustor.** When a trustee is appointed by a court or public officer, as such, such court or officer is the trustor, within the meaning of the last section.

**History: En. Sec. 3002, Civ. C. 1895; re-en. Sec. 5390, Rev. C. 1907; re-en. Sec. 7904, R.C.M. 1921; Cal. Civ. C. Sec. 2252; Field Civ. C. Sec. 1193; re-en. Sec. 7904, R.C.M. 1935; R.C.M. 1947, 86-403.**

**72-23-203. Declaration of trust.** The nature, extent, and object of a trust are expressed in the declaration of trust.

**History: En. Sec. 3003, Civ. C. 1895; re-en. Sec. 5391, Rev. C. 1907; re-en. Sec. 7905, R.C.M. 1921; Cal. Civ. C. Sec. 2253; Field Civ. C. Sec. 1194; re-en. Sec. 7905, R.C.M. 1935; R.C.M. 1947, 86-404.**

**72-23-204. Declarations of trustor.** All declarations of a trustor to his trustees in relation to the trust before its acceptance by the trustees or any of them are to be deemed part of the declaration of the trust, except that when a declaration of trust is made in writing, all previous declarations by the same trustor are merged therein.

**History: En. Sec. 3004, Civ. C. 1895; re-en. Sec. 5392, Rev. C. 1907; re-en. Sec. 7906, R.C.M. 1921; Cal. Civ. C. Sec. 2254; Field Civ. C. Sec. 1195; re-en. Sec. 7906, R.C.M. 1935; R.C.M. 1947, 86-405.**

## Part 3

## Obligations and Powers of Trustee

**72-23-301. Trustee to obey declaration of trust.** A trustee must fulfill the purpose of the trust as declared at its creation and must follow all the directions of the trustor given at that time, except as modified by the consent of all parties interested, in the same manner and to the same extent as an employee.

**History: En. Sec. 3010, Civ. C. 1895; re-en. Sec. 5393, Rev. C. 1907; re-en. Sec. 7908, R.C.M. 1921; Cal. Civ. C. Sec. 2258; Field Civ. C. Sec. 1196; re-en. Sec. 7908, R.C.M. 1935; R.C.M. 1947, 86-501.**

**72-23-302. Standard of care and diligence in execution of trust.** A trustee, whether he receives any compensation or not, must use at least ordinary care and diligence in the execution of his trust.

**History: En. Sec. 3011, Civ. C. 1895; re-en. Sec. 5394, Rev. C. 1907; re-en. Sec. 7909, R.C.M. 1921; Cal. Civ. C. Sec. 2259; Field Civ. C. Sec. 1197; re-en. Sec. 7909, R.C.M. 1935; R.C.M. 1947, 86-502.**

**72-23-303. Investment of money by trustee.** A trustee must invest money received by him under the trust, as fast as he collects a sufficient amount, in such manner as to afford reasonable security and interest for the same.

**History: En. Sec. 3013, Civ. C. 1895; re-en. Sec. 5396, Rev. C. 1907; re-en. Sec. 7911, R.C.M. 1921; Cal. Civ. C. Sec. 2261; Field Civ. C. Sec. 1199; re-en. Sec. 7911, R.C.M. 1935; R.C.M. 1947, 86-504.**

**72-23-304. Interest on omission to invest trust moneys.** If a trustee omits to invest the trust moneys according to the last section, he must pay simple interest thereon if such omission is negligent merely and compound interest if it is willful.

**History: En. Sec. 3014, Civ. C. 1895; re-en. Sec. 5397, Rev. C. 1907; re-en. Sec. 7912, R.C.M. 1921; Cal. Civ. C. Sec. 2262; Field Civ. C. Sec. 1200; re-en. Sec. 7912, R.C.M. 1935; R.C.M. 1947, 86-505.**

**72-23-305. Purchase by trustee of claims against trust property.** A trustee cannot enforce any claim against the trust property which he purchases after or in contemplation of his appointment as trustee, but he may be allowed by any competent court to charge to the trust property what he has in good faith paid for the claim, upon discharging the same.

**History: En. Sec. 3015, Civ. C. 1895; re-en. Sec. 5398, Rev. C. 1907; re-en. Sec. 7913, R.C.M. 1921; Cal. Civ. C. Sec. 2263; Field Civ. C. Sec. 1201; re-en. Sec. 7913, R.C.M. 1935; R.C.M. 1947, 86-506.**

**72-23-306. Control of discretionary power by court.** A discretionary power conferred upon a trustee is presumed not to be left to his arbitrary discretion but may be controlled by the proper court if not reasonably exercised, unless an absolute discretion is clearly conferred by the declaration of trust.

**History: En. Sec. 3022, Civ. C. 1895; re-en. Sec. 5401, Rev. C. 1907; re-en. Sec. 7916, R.C.M. 1921; Cal. Civ. C. Sec. 2269; Field Civ. C. Sec. 1204; re-en. Sec. 7916, R.C.M. 1935; R.C.M. 1947, 86-509.**

**72-23-307. Trustee's powers as agent.** A trustee is a general agent for the trust property. His authority is such as is conferred upon him by the declaration of trust and by this chapter and none other. His acts within the scope of his authority bind the trust property to the same extent as the acts of an agent bind his principal.

**History: En. Sec. 3020, Civ. C. 1895; re-en. Sec. 5399, Rev. C. 1907; re-en. Sec. 7914, R.C.M. 1921; Cal. Civ. C. Sec. 2267; Field Civ. C. Sec. 1202; re-en. Sec. 7914, R.C.M. 1935; R.C.M. 1947, 86-507.**

**72-23-308. Cotrustees — unity of action required.** Where there are several cotrustees, all must unite in any act to bind the trust property unless the declaration of trust otherwise provides.

**History: En. Sec. 3021, Civ. C. 1895; re-en. Sec. 5400, Rev. C. 1907; re-en. Sec. 7915, R.C.M. 1921; Cal. Civ. C. Sec. 2268; Field Civ. C. Sec. 1203; re-en. Sec. 7915, R.C.M. 1935; R.C.M. 1947, 86-508.**

## Part 4

## Rights of Trustee

**72-23-401. Reimbursement of trustee.** A trustee is entitled to the repayment out of the trust property of all expenses actually and properly incurred by him in the performance of his trust. He is entitled to the repayment of even unlawful expenditures, if they were productive of actual benefit to the estate.

**History: En. Sec. 3030, Civ. C. 1895; re-en. Sec. 5402, Rev. C. 1907; re-en. Sec. 7917, R.C.M. 1921; Cal. Civ. C. Sec. 2273; Field Civ. C. Sec. 1205; re-en. Sec. 7917, R.C.M. 1935; R.C.M. 1947, 86-510.**

**72-23-402. Compensation of trustee.** When a declaration of trust created by will or otherwise is silent upon the subject of or the rate or amount of compensation, the trustee is entitled to such compensation as may be reasonable under the circumstances.

**History: En. Sec. 3031, Civ. C. 1895; re-en. Sec. 5403, Rev. C. 1907; amd. Sec. 7918, R.C.M. 1921; Cal. Civ. C. Sec. 2274; Field Civ. C. Sec. 1206; re-en. Sec. 7918, R.C.M. 1935; amd. Sec. 1, Ch. 65, L. 1965; R.C.M. 1947, 86-511.**

**72-23-403. Involuntary trustee — no reimbursement or compensation.** An involuntary trustee, who becomes such through his own fault, has none of the rights mentioned in the two preceding sections.

**History: En. Sec. 3032, Civ. C. 1895; re-en. Sec. 5404, Rev. C. 1907; re-en. Sec. 7919, R.C.M. 1921; Cal. Civ. C. Sec. 2275; Field Civ. C. Sec. 1207; re-en. Sec. 7919, R.C.M. 1935; R.C.M. 1947, 86-512.**

## Part 5

## Termination of Trust and Office of Trustee — Succession

**72-23-501. Trust — how extinguished.** A trust is extinguished by the entire fulfillment of its object or by such object becoming impossible or unlawful.

**History: En. Sec. 3040, Civ. C. 1895; re-en. Sec. 5405, Rev. C. 1907; re-en. Sec. 7920, R.C.M. 1921; Cal. Civ. C. Sec. 2279; Field Civ. C. Sec. 1208; re-en. Sec. 7920, R.C.M. 1935; R.C.M. 1947, 86-601.**

**72-23-502. Revocation of trust — consent of beneficiaries — reservation of power.** A trust cannot be revoked by the trustor after its acceptance, actual or presumed, by the trustee and beneficiaries, except by the consent of all the beneficiaries, unless the declaration of trust reserves a power of revocation to the trustor, and in that case the power must be strictly pursued.

**History: En. Sec. 3041, Civ. C. 1895; re-en. Sec. 5406, Rev. C. 1907; re-en. Sec. 7921, R.C.M. 1921; Cal. Civ. C. Sec. 2280; Field Civ. C. Sec. 1209; re-en. Sec. 7921, R.C.M. 1935; R.C.M. 1947, 86-602.**

**72-23-503. Trustee's office — how vacated.** The office of a trustee is vacated:

(1) by his death; or

(2) by his discharge.

**History: En. Sec. 3042, Civ. C. 1895; re-en. Sec. 5407, Rev. C. 1907; re-en. Sec. 7922, R.C.M. 1921; Cal. Civ. C. Sec. 2281; Field Civ. C. Sec. 1210; re-en. Sec. 7922, R.C.M. 1935; R.C.M. 1947, 86-603.**

**72-23-504. Trustee — how discharged.** A trustee can be discharged from his trust only as follows:

(1) by the extinction of the trust;

(2) by the completion of his duties under the trust;

(3) by such means as may be prescribed by the declaration of trust;

(4) by the consent of the beneficiary if he had capacity to contract;

(5) by the judgment of a competent tribunal in a direct proceeding for that purpose that he is of unsound mind; or

(6) by the district court.

**History: En. Sec. 3043, Civ. C. 1895; re-en. Sec. 5408, Rev. C. 1907; re-en. Sec. 7923, R.C.M. 1921; Cal. Civ. C. Sec. 2282; Field Civ. C. Sec. 1211; re-en. Sec. 7923, R.C.M. 1935; R.C.M. 1947, 86-604.**

**72-23-505. Duty of trustee as to appointment of successor.** If a trustee procures or assents to his discharge from his office before his trust is fully executed, he must use at least ordinary care and diligence to secure the appointment of a trustworthy successor before accepting his own final discharge.

**History: En. Sec. 3012, Civ. C. 1895; re-en. Sec. 5395, Rev. C. 1907; re-en. Sec. 7910, R.C.M. 1921; Cal. Civ. C. Sec. 2260; Field Civ. C. Sec. 1198; re-en. Sec. 7910, R.C.M. 1935; R.C.M. 1947, 86-503.**

**72-23-506. Removal of trustee by court.** The district court may remove any trustee who has violated or is unfit to execute the trust or may accept the resignation of a trustee.

**History: En. Sec. 3044, Civ. C. 1895; re-en. Sec. 5409, Rev. C. 1907; re-en. Sec. 7924, R.C.M. 1921; Cal. Civ. C. Sec. 2283; Based on Field Civ. C. Sec. 1212; re-en. Sec. 7924, R.C.M. 1935; R.C.M. 1947, 86-605.**

**72-23-507. Vacant trusteeship filled by court.** The district court may appoint a trustee whenever there is a vacancy and the declaration of trust does not provide a practicable method of appointment.

**History: En. Sec. 3050, Civ. C. 1895; re-en. Sec. 5410, Rev. C. 1907; re-en. Sec. 7925, R.C.M. 1921; Cal. Civ. C. Sec. 2287; Based on Field Civ. C. Sec. 1213; re-en. Sec. 7925, R.C.M. 1935; R.C.M. 1947, 86-606.**

**72-23-508. Court to appoint trustees — when.** When a trust exists without any appointed trustee or where all the trustees renounce, die, or are discharged, the district court of the county where the trust property or some portion thereof is situated must appoint another trustee and direct the execution of the trust. The court may, in its discretion, appoint the original number or any less number of trustees.

**History: En. Sec. 3052, Civ. C. 1895; re-en. Sec. 5412, Rev. C. 1907; re-en. Sec. 7927, R.C.M. 1921; Cal. Civ. C. Sec. 2289; Based on Field Civ. C. Sec. 1215; re-en. Sec. 7927, R.C.M. 1935; R.C.M. 1947, 86-608.**

# CHAPTER 24

# TRUSTS IN RELATION TO REAL PROPERTY

### Part 1 — Nature and Creation

Section
72-24-101. What trusts may exist.
72-24-102. Creation of trusts.
72-24-103. For what purposes express trusts may be created.
72-24-104. Transfer to one for money paid by another — trust presumed.

### Part 2 — Powers, Rights, and Duties

72-24-201. Trustees of express trust vested with whole estate.
72-24-202. Authority of grantor over trust property.
72-24-203. Interest of grantee of trust property.
72-24-204. Interests not provided for in trust — reversion to grantor.
72-24-205. Transfer by beneficiary of interest in trust forbidden.
72-24-206. Act of trustee in contravention of trust void.
72-24-207. Power vested in several persons — execution.
72-24-208. Implied or resulting trust — bona fide purchasers protected.
72-24-209. Effect of omitting trust in conveyance — bona fide purchasers protected.
72-24-210. Profits of land liable to creditors in certain cases.
72-24-211. When estate of trustee to cease.

## Part 1

## Nature and Creation

**72-24-101. What trusts may exist.** Uses and trusts in relation to real property are those only which are specified in this chapter.

**History: En. Sec. 1310, Civ. C. 1895; re-en. Sec. 4536, Rev. C. 1907; re-en. Sec. 6783, R.C.M. 1921; Cal. Civ. C. Sec. 847; re-en. Sec. 6783, R.C.M. 1935; R.C.M. 1947, 86-101.**

**72-24-102. Creation of trusts.** No trust in relation to real property is valid unless created or declared by:

(1) a written instrument, subscribed by the trustee or by his agent thereto authorized by writing;

(2) the instrument under which the trustee claims the estate affected; or

(3) operation of law.

**History: En. Sec. 1311, Civ. C. 1895; re-en. Sec. 4537, Rev. C. 1907; re-en. Sec. 6784, R.C.M. 1921; Cal. Civ. C. Sec. 852; Field Civ. C. Sec. 280; re-en. Sec. 6784, R.C.M. 1935; R.C.M. 1947, 86-102.**

**72-24-103. For what purposes express trusts may be created.** Express trusts may be created for any of the following purposes:

(1) to sell real property and apply or dispose of the proceeds in accordance with the instrument creating the trust;

(2) to mortgage or lease real property for the benefit of annuitants or other legatees or for the purpose of satisfying any charge thereon;

(3) to receive the rents and profits of real property and pay them to or apply them to the use of any person, whether ascertained at the time of the creation of the trust or not, for himself or for his family during the life of such person or for any shorter term, subject to the rules of 70-1-410; Title 70, chapter 15, part 2; Title 70, chapter 17, part 1; and 70-27-104 through 70-27-107; or

(4) to receive the rents and profits of real property and to accumulate the same for the purposes and within the limits prescribed by the sections above enumerated.

**History: En. Sec. 1314, Civ. C. 1895; re-en. Sec. 4540, Rev. C. 1907; re-en. Sec. 6787, R.C.M. 1921; Cal. Civ. C. Sec. 857; Based on Field Civ. C. Sec. 285; re-en. Sec. 6787, R.C.M. 1935; R.C.M. 1947, 86-105.**

**72-24-104. Transfer to one for money paid by another — trust presumed.** When a transfer of real property is made to one person and the consideration thereof is paid by or for another, a trust is presumed to result in favor of the person by or for whom such payment is made.

**History: En. Sec. 1312, Civ. C. 1895; re-en. Sec. 4538, Rev. C. 1907; re-en. Sec. 6785, R.C.M. 1921; Cal. Civ. C. Sec. 853; Field Civ. C. Sec. 281; re-en. Sec. 6785, R.C.M. 1935; R.C.M. 1947, 86-103.**

## Part 2

## Powers, Rights, and Duties

**72-24-201. Trustees of express trust vested with whole estate.** Except as hereinafter otherwise provided, every express trust in real property, valid as such in its creation, vests the whole estate in the trustees, subject only to the execution of the trust. The beneficiaries take no estate or interest in the property but may enforce the performance of the trust.

**History: En. Sec. 1317, Civ. C. 1895; re-en. Sec. 4543, Rev. C. 1907; re-en. Sec. 6790, R.C.M. 1921; Cal. Civ. C. Sec. 863; Field Civ. C. Sec. 291; re-en. Sec. 6790, R.C.M. 1935; R.C.M. 1947, 86-108.**

**72-24-202. Authority of grantor over trust property.** Notwithstanding anything contained in the last section, the author of a trust may, in its creation, prescribe to whom the real property to which the trust relates shall belong in the event of the failure or termination of the trust and may transfer or devise such property, subject to the execution of the trust.

**History: En. Sec. 1318, Civ. C. 1895; re-en. Sec. 4544, Rev. C. 1907; re-en. Sec. 6791, R.C.M. 1921; Cal. Civ. C. Sec. 864; Field Civ. C. Sec. 292; re-en. Sec. 6791, R.C.M. 1935; R.C.M. 1947, 86-109.**

**72-24-203. Interest of grantee of trust property.** The grantee or devisee of real property subject to a trust acquires a legal estate in the property as against all persons except the trustees and those lawfully claiming under them.

**History: En. Sec. 1319, Civ. C. 1895; re-en. Sec. 4545, Rev. C. 1907; re-en. Sec. 6792, R.C.M. 1921; Cal. Civ. C. Sec. 865; Field Civ. C. Sec. 293; re-en. Sec. 6792, R.C.M. 1935; R.C.M. 1947, 86-110.**

**72-24-204. Interests not provided for in trust — reversion to grantor.** Where an express trust is created in relation to real property, every estate not embraced in the trust and not otherwise disposed of is left in the author of the trust or his successors.

**History: En. Sec. 1320, Civ. C. 1895; re-en. Sec. 4546, Rev. C. 1907; re-en. Sec. 6793, R.C.M. 1921; Cal. Civ. C. Sec. 866; Field Civ. C. Sec. 294; re-en. Sec. 6793, R.C.M. 1935; R.C.M. 1947, 86-111.**

**72-24-205. Transfer by beneficiary of interest in trust forbidden.** The beneficiary of a trust for the receipt of the rents and profits of real property or for the payment of an annuity out of such rents and profits cannot transfer or in any manner dispose of his interest in such trust.

**History: En. Sec. 1321, Civ. C. 1895; re-en. Sec. 4547, Rev. C. 1907; re-en. Sec. 6794, R.C.M. 1921; Cal. Civ. C. Sec. 867; Based on Field Civ. C. Secs. 295 and 296; re-en. Sec. 6794, R.C.M. 1935; R.C.M. 1947, 86-112.**

**72-24-206. Act of trustee in contravention of trust void.** Where a trust in relation to real property is expressed in the instrument creating the estate, every transfer or other act of the trustee in contravention of the trust is absolutely void.

**History: En. Sec. 1323, Civ. C. 1895; re-en. Sec. 4549, Rev. C. 1907; re-en. Sec. 6796, R.C.M. 1921; Cal. Civ. C. Sec. 870; Field Civ. C. Sec. 298; re-en. Sec. 6796, R.C.M. 1935; R.C.M. 1947, 86-114.**

**72-24-207. Power vested in several persons — execution.** Where a power is vested in several persons, all must unite in its execution; but in case any one or more of them are dead, the power may be executed by the survivor or survivors unless otherwise prescribed by the terms of the power.

**History: En. Sec. 1316, Civ. C. 1895; re-en. Sec. 4542, Rev. C. 1907; re-en. Sec. 6789, R.C.M. 1921; Cal. Civ. C. Sec. 860; Field Civ. C. Sec. 323; re-en. Sec. 6789, R.C.M. 1935; R.C.M. 1947, 86-107.**

**72-24-208. Implied or resulting trust — bona fide purchasers protected.** No implied or resulting trust can prejudice the rights of a purchaser or encumbrancer of real property for value and without notice of the trust.

**History: En. Sec. 1313, Civ. C. 1895; re-en. Sec. 4539, Rev. C. 1907; re-en. Sec. 6786, R.C.M. 1921; Cal. Civ. C. Sec. 856; Field Civ. C. Sec. 284; re-en. Sec. 6786, R.C.M. 1935; R.C.M. 1947, 86-104.**

**72-24-209. Effect of omitting trust in conveyance — bona fide purchasers protected.** Where an express trust is created in relation to real property but is not contained or declared in the grant to the trustee or in an instrument signed by him and recorded in the office with the grant to the trustee, such grant must be deemed absolute in favor of purchasers from such trustee without notice and for a valuable consideration.

**History: En. Sec. 1322, Civ. C. 1895; re-en. Sec. 4548, Rev. C. 1907; re-en. Sec. 6795, R.C.M. 1921; Cal. Civ. C. Sec. 869; Based on Field Civ. C. Sec. 297; re-en. Sec. 6795, R.C.M. 1935; R.C.M. 1947, 86-113.**

**72-24-210. Profits of land liable to creditors in certain cases.** When a trust is created to receive the rents and profits of real property and no valid direction for accumulation is given, the surplus of such rents and profits, beyond the sum that may be necessary for the education and support of the persons for whose benefit the trust is created, is liable to the claims of the creditors of such person in the same manner as personal property which cannot be reached by execution.

**History: En. Sec. 1315, Civ. C. 1895; re-en. Sec. 4541, Rev. C. 1907; re-en. Sec. 6788, R.C.M. 1921; Cal. Civ. C. Sec. 859; Field Civ. C. Sec. 287; re-en. Sec. 6788, R.C.M. 1935; R.C.M. 1947, 86-106.**

**72-24-211. When estate of trustee to cease.** When the purpose for which an express trust was created ceases, the estate of the trustee also ceases.

**History: En. Sec. 1324, Civ. C. 1895; re-en. Sec. 4550, Rev. C. 1907; re-en. Sec. 6797, R.C.M. 1921; Cal. Civ. C. Sec. 871; Field Civ. C. Sec. 299; re-en. Sec. 6797, R.C.M. 1935; R.C.M. 1947, 86-115.**

# CHAPTER 25

# UNIFORM PRINCIPAL AND INCOME ACT

### Part 1 — General Provisions

Section
72-25-101. Short title.
72-25-102. Definitions.
72-25-103. Applicability.
72-25-104. Chapter to govern — what and when.
72-25-105. Interpretation — uniformity.

### Part 2 — Ascertainment of Principal and Income—Allocation of Receipts

72-25-201. Receipts constituting income or principal generally — disposition or retention.
72-25-202. Death of tenant between payment dates — apportionment.
72-25-203. Corporate dividends — subscription rights — liquidation — merger.
72-25-204. Bonds or obligations as principal — valuation — loss or gain on sale.
72-25-205. Operation of business.
72-25-206. Animals constituting principal — offspring.
72-25-207. Natural resources — proceeds from severance.
72-25-208. Property subject to depletion as principal.
72-25-209. Unprofitable principal — change in form of investment — delayed income.

### Part 3 — Allocation of Expenses

72-25-301. Expenses when trust created.
72-25-302. Expenses when no trust created — improvements.

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## Part 1

## General Provisions

**72-25-101. Short title.** This chapter may be cited as the "Uniform Principal and Income Act".

**History: En. Sec. 15, Ch. 277, L. 1959; R.C.M. 1947, 67-1915.**

**72-25-102. Definitions.** In this chapter, the following definitions apply:

(1) "Principal" means any realty or personalty which has been so set aside or limited by the owner thereof or person thereto legally empowered that it and any substitutions for it are eventually to be conveyed, delivered, or paid to a person, while the return therefrom or use thereof or any part of such return or use is in the meantime to be taken or received by or held for accumulation for the same or another person.

(2) "Income" means the return derived from principal.

(3) "Tenant" means the person to whom income is presently or currently payable or for whom it is accumulated or who is entitled to the beneficial use of the principal presently and for a time prior to its distribution.

(4) "Remainderman" means the person ultimately entitled to the principal, whether named or designated by the terms of the transaction by which the principal was established or determined by operation of law.

(5) "Trustee" includes the original trustee of any trust to which the principal may be subject and also any succeeding or added trustee.

**History: En. Sec. 1, Ch. 277, L. 1959; R.C.M. 1947, 67-1901.**

**72-25-103. Applicability.** This chapter shall apply to all estates of tenants or remaindermen which become legally effective after March 17, 1959.

**History: En. Sec. 17, Ch. 277, L. 1959; R.C.M. 1947, 67-1916(part).**

**72-25-104. Chapter to govern — what and when.** This chapter shall govern the ascertainment of income and principal and the apportionment of receipts and expenses between tenants and remaindermen in all cases where a principal has been established with or, unless otherwise stated hereinafter, without the interposition of a trust; except that in the establishment of the principal, provision may be made touching all matters covered by this chapter, and the person establishing the principal may himself direct the manner of ascertainment of income and principal and the apportionment of receipts and expenses or grant discretion to the trustee or other person to do so, and such provision and direction where not otherwise contrary to law shall control notwithstanding this chapter.

**History: En. Sec. 2, Ch. 277, L. 1959; R.C.M. 1947, 67-1902.**

**72-25-105. Interpretation — uniformity.** This chapter shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it.

**History: En. Sec. 14, Ch. 277, L. 1959; R.C.M. 1947, 67-1914.**

## Part 2

## Ascertainment of Principal and Income Allocation of Receipts

**72-25-201. Receipts constituting income or principal generally — disposition or retention.** (1) All receipts of money or other property paid or delivered as rent of realty or hire of personalty or dividends on corporate shares payable other than in shares of the corporation itself or interest on money loaned or interest on or the rental or use value of property wrongfully withheld or tortiously damaged or otherwise in return for the use of principal shall be deemed income unless otherwise expressly provided in this chapter.

(2) All receipts of money or other property paid or delivered as the consideration for the sale or other transfer, not a leasing or letting, of property forming a part of the principal or as a repayment of loans or in liquidation of the assets of a corporation or as the proceeds of property taken on eminent domain proceedings where separate awards to tenant and remainderman are not made or as proceeds of insurance upon property forming a part of the principal, except where such insurance has been issued for the benefit of either tenant or remainderman alone, or otherwise as a refund or replacement or change in form of principal shall be deemed principal unless otherwise expressly provided in this chapter. Any profit or loss resulting upon any change in form of principal shall inure to or fall upon principal.

(3) All income after payment of expenses properly chargeable to it shall be paid and delivered to the tenant or retained by him, if already in his possession, or held for accumulation where legally so directed by the terms of the transaction by which the principal was established; while the principal shall be held for ultimate distribution as determined by the terms of the transaction by which it was established or by law.

**History: En. Sec. 3, Ch. 277, L. 1959; R.C.M. 1947, 67-1903.**

**72-25-202. Death of tenant between payment dates — apportionment.** (1) Whenever a tenant shall have the right to income from periodic payments, which shall include rent, interest on loans, and annuities but shall not include dividends on corporate shares, and such right shall cease and determine by death or in any other manner at a time other than the date when such periodic payments should be paid, he or his personal representative shall be entitled to that portion of any such income next payable which amounts to the same percentage thereof as the time elapsed from the last due date of such periodic payments to and including the day of the determination of his right is of the total period during which such income would normally accrue. The remaining income shall be paid to the person next entitled to income by the terms of the transaction by which the principal was established. But no action shall be brought by the trustee or tenant to recover such apportioned income or any portion thereof until after the day on which it would have become due to the tenant but for the determination of the right of the tenant entitled thereto.

(2) The provisions of this section shall apply whether an ultimate remainderman is specifically named or not. Likewise when the right of the first tenant accrues at a time other than the payment dates of such periodic payments, he shall only receive that portion of such income which amounts to the same percentage thereof as the time during which he has been so entitled is of the total period during which such income would normally accrue; the balance shall be a part of the principal.

**History: En. Sec. 4, Ch. 277, L. 1959; R.C.M. 1947, 67-1904.**

**72-25-203. Corporate dividends — subscription rights — liquidation — merger.** (1) All dividends on shares of a corporation forming a part of the principal which are payable in the shares of the corporation shall be deemed principal. Subject to the provisions of this section, all dividends payable otherwise than in the shares of the corporation itself, including ordinary and extraordinary dividends and dividends payable in shares or other securities or obligations of corporations other than the declaring corporation, shall be deemed income. Where the trustee shall have the option of receiving a dividend either in cash or in the shares of the declaring corporation, it shall be considered as a cash dividend and deemed income, irrespective of the choice made by the trustee.

(2) All rights to subscribe to the shares or other securities or obligations of a corporation accruing on account of the ownership of shares or other securities in

such corporation and the proceeds of any sale of such rights shall be deemed principal. All rights to subscribe to the shares or other securities or obligations of a corporation accruing on account of the ownership of shares or other securities in another corporation and the proceeds of any sale of such rights shall be deemed income.

(3) Where the assets of a corporation are liquidated, amounts paid upon corporate shares as cash dividends declared before such liquidation occurred or as arrears of preferred or guaranteed dividends shall be deemed income; all other amounts paid upon corporate shares on disbursement of the corporate assets to the stockholders shall be deemed principal. All disbursements of corporate assets to the stockholders, whenever made, which are designated by the corporation as a return of capital or division of corporate property shall be deemed principal.

(4) Where a corporation succeeds another by merger, consolidation, or reorganization or otherwise acquires its assets and the corporate shares of the succeeding corporation are issued to the shareholders of the original corporation in like proportion to or in substitution for their shares of the original corporation, the two corporations shall be considered a single corporation in applying the provisions of this section. But two corporations shall not be considered a single corporation under this section merely because one owns corporate shares of or otherwise controls or directs the other.

(5) In applying this section the date when a dividend accrues to the person who is entitled to it shall be held to be the date specified by the corporation as the one on which the stockholders entitled thereto are determined or, in default thereof, the date of declaration of the dividend.

**History: En. Sec. 5, Ch. 277, L. 1959; R.C.M. 1947, 67-1905.**

**72-25-204. Bonds or obligations as principal — valuation — loss or gain on sale.** Where any part of the principal consists of bonds or other obligations for the payment of money, they shall be deemed principal at their inventory value or in default thereof at their market value at the time the principal was established or at their cost where purchased later, regardless of their par or maturity value; and upon their respective maturities or upon their sale, any loss or gain realized thereon shall fall upon or inure to the principal.

**History: En. Sec. 6, Ch. 277, L. 1959; R.C.M. 1947, 67-1906.**

**72-25-205. Operation of business.** (1) Whenever a trustee or a tenant is authorized by the terms of the transaction by which the principal was established or by law to use any part of the principal in the continuance of a business which the original owner of the property comprising the principal had been carrying on, the net profits of such business attributable to such principal shall be deemed income.

(2) Where such business consists of buying and selling property, the net profits for any period shall be ascertained by deducting from the gross returns during and the inventory value of the property at the end of such period the expenses during and the inventory value of the property at the beginning of such period.

(3) Where such business does not consist of buying and selling property, the net income shall be computed in accordance with the customary practice of such business but not in such way as to decrease the principal.

(4) Any increase in the value of the principal used in such business shall be deemed principal, and all losses in any one calendar year, after the income from such business for that year has been exhausted, shall fall upon principal.

**History: En. Sec. 7, Ch. 277, L. 1959; R.C.M. 1947, 67-1907.**

**72-25-206. Animals constituting principal — offspring.** Where any part of the principal consists of animals employed in business, the provisions of 72-25-205 shall apply. In other cases where the animals are held as a part of the principal partly or wholly because of the offspring or increase which they are expected to produce, all offspring or increase shall be deemed principal to the extent necessary to maintain the original number of such animals and the remainder shall be deemed income; and in all other cases such offspring or increase shall be deemed income.

**History: En. Sec. 8, Ch. 277, L. 1959; R.C.M. 1947, 67-1908.**

**72-25-207. Natural resources — proceeds from severance.** (1) Where any part of the principal consists of property in lands from which may be taken timber, minerals, oils, gas, or other natural resources and the trustee or tenant is authorized by law or by the terms of the transaction by which the principal was established to sell, lease, or otherwise develop such natural resources and no provision is made for the disposition of the net proceeds thereof after the payment of expenses and carrying charges on such property, such proceeds, if received as rent on a lease, shall be deemed income, but if received as consideration, whether as royalties or otherwise, for the permanent severance of such natural resources from the lands, shall be deemed principal to be invested to produce income.

(2) Nothing in this section shall be construed to abrogate or extend any right which may otherwise have accrued by law to a tenant to develop or work such natural resources for his own benefit.

**History: En. Sec. 9, Ch. 277, L. 1959; R.C.M. 1947, 67-1909.**

**72-25-208. Property subject to depletion as principal.** Where any part of the principal consists of property subject to depletion, such as leaseholds, patents, copyrights, and royalty rights, and the trustee or tenant in possession is not under a duty to change the form of the investment of the principal, the full amount of rents, royalties, or return from the property shall be income to the tenant; but where the trustee or tenant is under a duty, arising either by law or by the terms of the transaction by which the principal was established, to change the form of the investment, either at once or as soon as it may be done without loss, then the return from such property not in excess of 5% per annum of its fair inventory value or in default thereof its market value at the time the principal was established or at its cost where purchased later shall be deemed income and the remainder principal.

**History: En. Sec. 10, Ch. 277, L. 1959; R.C.M. 1947, 67-1910.**

**72-25-209. Unprofitable principal — change in form of investment — delayed income.** (1) Where any part of a principal in the possession of a trustee consists of realty or personalty which for more than a year and until disposed of as hereinafter stated has not produced an average net income of at least 1% per annum of its fair inventory value or in default thereof its market value at the time the principal was established or of its cost where purchased later and the trustee is under a duty to change the form of the investment as soon as it may be done without sacrifice of value and such change is delayed but is made before the principal is finally distributed, then the tenant, or in case of his death his personal representative, shall be entitled to share in the net proceeds received from the property as delayed income to the extent hereinafter stated.

(2) Such income shall be the difference between the net proceeds received from the property and the amount which, had it been placed at simple interest at the rate of 5% per annum for the period during which the change was delayed, would have produced the net proceeds at the time of change, but in no event shall such

income be more than the amount by which the net proceeds exceed the fair inventory value of the property or in default thereof its market value at the time the principal was established or its cost where purchased later. The net proceeds shall consist of the gross proceeds received from the property less any expenses incurred in disposing of it and less all carrying charges which have been paid out of principal during the period while it has been unproductive.

(3) The change shall be taken to have been delayed from the time when the duty to make it first arose, which shall be presumed, in the absence of evidence to the contrary, to be 1 year after the trustee first received the property if then unproductive, otherwise 1 year after it became unproductive.

(4) If the tenant has received any income from the property or has had any beneficial use thereof during the period while the change has been delayed, his share of the delayed income shall be reduced by the amount of such income received or the value of the use had.

(5) In the case of successive tenants, the delayed income shall be divided among them or their representatives according to the length of the period for which each was entitled to income.

**History: En. Sec. 11, Ch. 277, L. 1959; R.C.M. 1947, 67-1911.**

## Part 3

## Allocation of Expenses

**72-25-301. Expenses when trust created.** (1) All ordinary expenses incurred in connection with the trust estate or with its administration and management, including regularly recurring taxes assessed against any portion of the principal, water rates, premiums on insurance taken upon the estates of both tenant and remainderman, interest on mortgages on the principal, ordinary repairs, trustees' compensation annually computed on principal, compensation of assistants, and court costs and attorneys' and other fees on regular accountings, shall be paid out of income; but such expenses where incurred in disposing of or as carrying charges on unproductive estate as defined in 72-25-209 shall be paid out of principal, subject to the provisions of subsection (2) of 72-25-209.

(2) All other expenses, including trustees' final termination commissions computed upon principal, cost of investing or reinvesting principal, attorneys' fees and other costs incurred in maintaining or defending any action to protect the trust or the property or assure the title thereof, unless due to the fault or cause of the tenant, and costs of or assessments for improvements to property forming part of the principal, shall be paid out of principal. Any tax levied by any authority, federal, state, or foreign, upon profit or gain defined as principal under the terms of subsection (2) of 72-25-201 shall be paid out of principal, notwithstanding said tax may be denominated a tax upon income by the taxing authority.

(3) Expenses paid out of income according to subsection (1) which represent regularly recurring charges shall be considered to have accrued from day to day and shall be apportioned on that basis whenever the right of the tenant begins or ends at some date other than the payment date of the expenses. Where the expenses to be paid out of income are of unusual amount, the trustee may distribute them throughout an entire year or part thereof or throughout a series of years. After such distribution, where the right of the tenant ends during the period, the expenses shall be apportioned between tenant and remainderman on the basis of such distribution.

(4) Where the costs of or special taxes or assessments for an improvement representing an addition of value to property held by the trustee as part of prin-

cipal are paid out of principal as provided in subsection (2), the trustee shall reserve out of income and add to the principal each year a sum equal to the cost of the improvement divided by the number of years of the reasonably expected duration of the improvement.

**History: En. Sec. 12, Ch. 277, L. 1959; amd. Sec. 1, Ch. 134, L. 1965; R.C.M. 1947, 67-1912.**

**72-25-302. Expenses when no trust created — improvements.** (1) The provisions of 72-25-301, so far as applicable and excepting those dealing with costs of or special taxes or assessments for improvements to property, shall govern the apportionment of expenses between tenants and remaindermen where no trust has been created, subject, however, to any legal agreement of the parties or any specific direction of the taxing or other statutes; but where either tenant or remainderman has incurred an expense for the benefit of his own estate and without the consent or agreement of the other, he shall pay such expense in full.

(2) Subject to the exceptions stated in subsection (1), the cost of or special taxes or assessments for an improvement representing an addition of value to property forming part of the principal shall be paid by the tenant, where such improvement cannot reasonably be expected to outlast the estate of the tenant. In all other cases a portion thereof only shall be paid by the tenant, while the remainder shall be paid by the remainderman. Such portion shall be ascertained by taking that percentage of the total which is found by dividing the present value of the tenant's estate by the present value of an estate of the same form as that of the tenant except that it is limited for a period corresponding to the reasonably expected duration of the improvement. The computation of present values of the estates shall be made on the expectancy basis set forth in the American experience tables of mortality, and no other evidence of duration or expectancy shall be considered.

**History: En. Sec. 13, Ch. 277, L. 1959; R.C.M. 1947, 67-1913.**

# CHAPTER 26

# UNIFORM GIFTS TO MINORS ACT

### Part 1 — General Provisions

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72-26-401. Who eligible to be successor.
72-26-402. Designation of successor by custodian or minor.
72-26-403. Rights and duties of successor.
72-26-404. Removal or bonding of custodian for cause.

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## Part 1

## General Provisions

**72-26-101. Short title.** This chapter may be cited as the "Revised Montana Uniform Gifts to Minors Act".

**History: En. Sec. 10, Ch. 245, L. 1957; amd. Sec. 7, Ch. 234, L. 1967; R.C.M. 1947, 67-1810.**

**72-26-102. Definitions.** In this chapter, unless the context otherwise requires, the following definitions apply:

(1) An "adult" is a person who has attained the age of 18 years.

(2) A "bank" is a bank, trust company, national banking association, savings bank, or industrial bank.

(3) A "broker" is a person lawfully engaged in the business of effecting transactions in securities for the account of others. The term includes a bank which effects such transactions. The term also includes a person lawfully engaged in buying and selling securities for his own account, through a broker or otherwise, as a part of a regular business.

(4) "Court" means the district court of general jurisdiction in the state of Montana.

(5) The "custodial property" includes:

(a) all securities, life insurance policies, annuity contracts, and money under the supervision of the same custodian for the same minor as a consequence of a gift or gifts made to the minor in a manner prescribed in this chapter;

(b) the income from the custodial property; and

(c) the proceeds, immediate and remote, from the sale, exchange, conversion, investment, reinvestment, surrender, or other disposition of such securities, money, life insurance policies, annuity contracts, and income.

(6) A "custodian" is a person so designated in a manner prescribed in this chapter. The term includes a successor custodian.

(7) A "financial institution" is a bank, a federal savings and loan association, a savings institution chartered and supervised as a savings and loan or similar institution under federal laws or the laws of a state, or a federal credit union or a credit union chartered and supervised under the laws of a state. A "domestic financial institution" is one chartered and supervised under the laws of this state or chartered and supervised under federal law and having its principal office in this state. An "insured financial institution" is one, deposits (including a savings, share, certificate, or deposit account) in which are, in whole or in part, insured by the federal deposit insurance corporation, by the federal savings and loan insurance corporation, or by a deposit insurance fund approved by this state.

(8) A "guardian" of a minor means the general guardian, guardian, tutor, or curator of his property or estate appointed or qualified by a court of this state or another state.

(9) An "issuer" is a person who places or authorizes the placing of his name on a security (other than as a transfer agent) to evidence that it represents a share, participation, or other interest in his property or in an enterprise or to evidence his duty or undertaking to perform an obligation evidenced by the security or who becomes responsible for or in place of any such person.

(10) A "legal representative" of a person is his executor or the administrator, general guardian, guardian, committee, conservator, tutor, or curator of his property or estate.

(11) A "life insurance policy or annuity contract" means a life insurance policy or annuity contract issued by an insurance company authorized to do business in this state on the life of a minor to whom a gift of the policy or contract is made in the manner prescribed in this chapter or on the life of a member of the minor's family.

(12) A "member" of a "minor's family" means any of the minor's parents, grandparents, brothers, sisters, uncles, and aunts, whether of the whole blood or the half blood or by or through legal adoption.

(13) A "minor" is a person who has not attained the age of 18 years.

(14) A "security" includes any note, stock, treasury stock, bond, debenture, evidence of indebtedness, certificate of interest or participation in an oil, gas, or mining title or lease or in payments out of production under such title or lease, collateral trust certificate, transferable share, voting trust certificate, or in general any interest or instrument commonly known as a security or any certificate of interest or participation in any temporary or interim certificate, receipt, or certificate of deposit for or any warrant or right to subscribe to or purchase any of the foregoing. The term does not include a security of which the donor is the issuer. A security is in "registered form" when it specifies a person entitled to it or to the rights it evidences and its transfer may be registered upon books maintained for that purpose by or on behalf of the issuer.

(15) A "transfer agent" is a person who acts as authenticating trustee, transfer agent, registrar, or other agent for an issuer in the registration of transfers of its securities or in the issue of new securities or in the cancellation of surrendered securities.

(16) A "trust company" is a bank or corporation authorized to exercise trust powers in the state of Montana.

**History: En. Sec. 1, Ch. 245, L. 1957; amd. Sec. 1, Ch. 234, L. 1967; amd. Sec. 11, Ch. 423, L. 1971; R.C.M. 1947, 67-1801.**

**72-26-103. Construction — uniformity — not exclusive.** (1) This chapter shall be so construed as to effectuate its general purpose to make uniform the law of those states which enact it.

(2) This chapter shall not be construed as providing an exclusive method for making gifts to minors.

**History: En. Sec. 9, Ch. 245, L. 1957; R.C.M. 1947, 67-1809.**

**72-26-104. Vested rights not to be impaired.** (1) Nothing in this chapter shall be construed to impair constitutionally vested rights.

(2) The provisions of this chapter as amended by section 8, Chapter 234, Laws of 1967, shall be construed as a continuation of this chapter according to the language employed and not as a new enactment. That amendment of this chapter does not affect gifts made in a manner prescribed therein or the powers, duties, or immunities conferred by gifts in such manner upon custodians and persons dealing with custodians. The provisions of this chapter as so amended apply after July 1, 1967, however, to all gifts made in a manner and form prescribed in this chapter, except insofar as such application impairs constitutionally vested rights.

**History: En. Sec. 12, Ch. 245, L. 1957; amd. Sec. 8, Ch. 234, L. 1967; R.C.M. 1947, 67-1811.**

## Part 2

## Making and Effect of Gift

**72-26-201. Manner of making gift.** (1) An adult person may, during his lifetime, make a gift of a security or money to a person who is a minor on the date of the gift:

(a) if the subject of the gift is a security in registered form, by registering it in the name of the donor, another adult person (an adult member of the minor's family, a guardian of the minor), or a trust company, followed in substance by the words: "as custodian for ... (name of minor) under the Montana Uniform Gifts to Minors Act";

(b) if the subject of the gift is a security not in registered form, by delivering it to an adult person other than the donor (an adult member, other than the donor, of the minor's family, a guardian of the minor) or a trust company, accompanied by a statement of gift in the following form, in substance, signed by the donor and the person designated as custodian:

"GIFT UNDER THE MONTANA UNIFORM GIFTS TO MINORS ACT

I, ...., (name of donor) hereby deliver to .... (name of custodian) as custodian for .... (name of minor) under the Montana Uniform Gifts to Minors Act, the following security(ies):

(Insert an appropriate description of the security or securities delivered sufficient to identify it or them.)

....................................................(signature of donor)

....... (name of custodian) hereby acknowledges receipt of the above described security(ies) as custodian for the above minor under the Montana Uniform Gifts to Minors Act.

Dated: .............

..........................................Signature of custodian)".

(c) if the subject of the gift is money, by paying or delivering it to a broker or a domestic financial institution for a credit to an account in the name of the donor, another adult (an adult member of the minor's family, a guardian of the minor), or a trust company followed in substance by the words: "as custodian for .... (name of minor) under the Montana Uniform Gifts to Minors Act".

(2) Any gift made in a manner prescribed in subsection (1) may be made to only one minor and only one person may be the custodian.

(3) A donor who makes a gift to a minor in a manner prescribed in subsection (1) shall promptly do all things within his power to put the subject of the gift in the possession and control of the custodian, but neither the donor's failure to comply with this subsection nor his designation of an ineligible person as custodian nor renunciation by the person designated as custodian affects the consummation of the gift.

(4) If the subject to the gift is a life insurance policy or annuity contract, an adult person may, during his lifetime, make a gift thereof to a person who is a minor on the date of the gift by causing the ownership of the policy or contract to be registered with the issuing insurance company in the name of the donor, another adult, an adult member of the minor's family, a guardian of the minor, or a trust company, followed in substance by the words: "as custodian for .... (name of minor) under the Montana Uniform Gifts to Minors Act".

**History: En. Sec. 2, Ch. 245, L. 1957; amd. Sec. 2, Ch. 234, L. 1967; R.C.M. 1947, 67-1802.**

**72-26-202. Effect of gift.** (1) A gift made in a manner prescribed in this chapter is irrevocable and conveys to the minor indefeasibly vested legal title to the security, life insurance policy, annuity contract, or money given, but no guardian of the minor has any right, power, duty, or authority with respect to the custodial property except as provided in this chapter.

(2) By making a gift in a manner prescribed in this chapter, the donor incorporates in his gift all the provisions of this chapter and grants to the custodian and to any issuer, transfer agent, bank, financial institution, life insurance company, broker, or third person dealing with a person designated as custodian the respective powers, rights, and immunities provided in this chapter.

**History: En. Sec. 3, Ch. 245, L. 1957; amd. Sec. 3, Ch. 234, L. 1967; R.C.M. 1947, 67-1803.**

## Part 3

## Gift Administration — Custodian

**72-26-301. Bond not required.** Except as otherwise provided in this chapter, a custodian shall not be required to give a bond for the performance of his duties.

**History: En. Sec. 5, Ch. 245, L. 1957; R.C.M. 1947, 67-1805(d).**

**72-26-302. Duties and powers of custodian.** (1) The custodian shall collect, hold, manage, invest, and reinvest the custodial property.

(2) The custodian shall pay over to the minor for expenditure by him or expend for the minor's benefit so much of or all the custodial property as the custodian deems advisable for the support, maintenance, education, and benefit of the minor in the manner, at the time or times, and to the extent that the custodian in his discretion deems suitable and proper, with or without court order, with or without regard to the duty of himself or of any other person to support the minor or his ability to do so, and with or without regard to any other income or property of the minor which may be applicable or available for any such purpose.

(3) The court, on the petition of a parent or guardian of the minor or of the minor, if he has attained the age of 14 years, may order the custodian to pay over to the minor for expenditure by him or to expend so much of or all the custodial property as is necessary for the minor's support, maintenance, or education.

(4) To the extent that the custodial property is not so expended, the custodian shall deliver or pay it over to the minor on his attaining the age of 18 years, or if the minor dies before attaining the age of 18 years, he shall thereupon deliver or pay it over to the estate of the minor.

(5) The custodian, notwithstanding statutes restricting investment by fiduciaries, shall invest and reinvest the custodial property as would a prudent man of discretion and intelligence who is seeking a reasonable income and the preservation of his capital, except that he may, in his discretion and without liability to the minor or his estate, retain a security given to the minor in a manner prescribed in this chapter or hold money so given in an account in the financial institution to which it was paid or delivered by the donor.

(6) The custodian may sell, exchange, convert, surrender, or otherwise dispose of custodial property in the manner, at the time or times, for the price or prices, and upon the terms he deems advisable. He may vote, in person or by general or limited proxy, a security which is custodial property. He may consent, directly or through a committee or other agent, to the reorganization, consolidation, merger, dissolution, or liquidation of an issuer, a security of which is custodial property, and to the sale, lease, pledge, or mortgage of any property by or to such an issuer

and to any other action by such an issuer. He may execute and deliver any and all instruments in writing which he deems advisable to carry out any of his powers as custodian.

(7) The custodian shall register each security which is custodial property and in registered form in the name of the custodian, followed in substance by the words: "as custodian for .... (name of minor) under the Montana Uniform Gifts to Minors Act". The custodian shall hold all money which is custodial property in an account with a broker or in an insured domestic financial institution in the name of the custodian, followed in substance by the words: "as custodian for .... (name of minor) under the Montana Uniform Gifts to Minors Act". The custodian shall keep all other custodial property separate and distinct from his own property in a manner to identify it clearly as custodial property.

(8) The custodian shall keep records of all transactions with respect to the custodial property and make them available for inspection at reasonable intervals by a parent or legal representative of the minor or by the minor, if he has attained the age of 14 years.

(9) A custodian has (and holds as powers in trust) with respect to the custodial property, in addition to the rights and powers provided in this chapter, all the rights and powers which a guardian has with respect to property not held as custodial property.

(10) If the subject of the gift is a life insurance policy or annuity contract, the custodian:

(a) in his capacity as custodian, has all the incidents of ownership in the policy or contract to the same extent as if he were the owner, except that the designated beneficiary of any policy or contract on the life of the minor shall be the minor's estate and the designated beneficiary of any policy or contract on the life of a person other than the minor shall be the custodian as custodian for the minor for whom he is acting; and

(b) may pay premiums on the policy or contract out of the custodial property.

**History: En. Sec. 4, Ch. 245, L. 1957; amd. Sec. 4, Ch. 234, L. 1967; amd. Sec. 12, Ch. 423, L. 1971; R.C.M. 1947, 67-1804.**

**72-26-303. Exemption of third persons from liability.** (1) No issuer, transfer agent, bank, life insurance company, broker, or other person or financial institution acting on the instructions of or otherwise dealing with any person purporting to act as a donor or in the capacity of a custodian is responsible for determining whether the person designated as custodian by the purported donor or by the custodian or purporting to act as a custodian has been duly designated or whether any purchase, sale, or transfer to or by or any other act of any person purporting to act in the capacity of custodian is in accordance with or authorized by this chapter or is obliged to inquire into the validity or propriety under this chapter of any instrument or instructions executed or given by a person purporting to act as a donor or in the capacity of a custodian or is bound to see to the application by any person purporting to act in the capacity of custodian of any money or other property paid or delivered to him.

(2) No issuer, transfer agent, bank, life insurance company, broker, or other person or financial institution acting on any instrument of designation of a successor custodian, executed as provided in 72-26-402 by a minor to whom a gift has been made in a manner prescribed in this chapter and who has attained the age of 14 years, is responsible for determining whether the person designated by the minor as successor custodian has been duly designated or is obliged to inquire into the validity or propriety under this chapter of the instrument of designation.

**History: En. Sec. 6, Ch. 245, L. 1957; amd. Sec. 5, Ch. 234, L. 1967; R.C.M. 1947, 67-1806.**

**72-26-304. Custodian's expenses and compensation.** (1) A custodian is entitled to reimbursement from the custodial property for his reasonable expenses incurred in the performance of his duties.

(2) A custodian may act without compensation for his services.

(3) Unless he is a donor, a custodian may receive from the custodial property reasonable compensation for his services determined by one of the following standards in the order stated:

(a) a direction by the donor when the gift is made;
(b) a statute of this state applicable to custodians;
(c) the statute of this state applicable to guardians;
(d) an order of the court.

**History: En. Sec. 5, Ch. 245, L. 1957; R.C.M. 1947, 67-1805(a) thru (c).**

**72-26-305. Limited liability of uncompensated custodian.** A custodian not compensated for his services is not liable for losses to the custodial property unless they result from his bad faith, intentional wrongdoing, or gross negligence or from his failure to maintain the standard of prudence in investing the custodial property provided in this chapter.

**History: En. Sec. 5, Ch. 245, L. 1957; R.C.M. 1947, 67-1805(e).**

**72-26-306. Accounting by custodian.** (1) The minor, if he has attained the age of 14 years, or the legal representative of the minor, an adult member of the minor's family, or a donor or his legal representative may petition the court for an accounting by the custodian or his legal representative.

(2) The court, in a proceeding under this chapter or otherwise, may require or permit the custodian or his legal representative to account and, if the custodian is removed, shall so require and order delivery of all custodial property to the successor custodian and the execution of all instruments required for the transfer thereof.

**History: En. Sec. 8, Ch. 245, L. 1957; R.C.M. 1947, 67-1808.**

## Part 4

## Resignation, Death, or Removal of Custodian — Bonding — Successor

**72-26-401. Who eligible to be successor.** Only an adult member of the minor's family, a guardian of the minor, or a trust company is eligible to become a successor custodian.

**History: En. Sec. 7, Ch. 245, L. 1957; amd. Sec. 6, Ch. 234, L. 1967; amd. Sec. 13, Ch. 423, L. 1971; R.C.M. 1947, 67-1807(part).**

**72-26-402. Designation of successor by custodian or minor.** (1) A custodian may designate his successor by executing and dating an instrument of designation before a subscribing witness other than the successor; the instrument of designation may but need not contain the resignation of the custodian. If the custodian does not so designate his successor before he dies or becomes legally incapacitated and the minor has attained the age of 14 years, the minor may designate a successor custodian by executing an instrument of designation before a subscribing witness other than the successor.

(2) The designation of a successor custodian as provided in subsection (1) takes effect as to each item of the custodial property when the custodian resigns, dies, or becomes legally incapacitated and the custodian or his legal representative:

(a) causes the item, if it is a security which is custodial property and in registered form or a life insurance policy or annuity contract, to be registered, with the issuing insurance company in the case of a life insurance policy or annuity contract, in the name of the successor custodian, followed in substance by the words: "as custodian for .... (name of minor) under the Montana Uniform Gifts to Minors Act"; and

(b) delivers or causes to be delivered to the successor custodian any other item of the custodial property, together with the instrument of designation of the successor custodian or a true copy thereof and any additional instruments required for the transfer thereof to the successor custodian.

(3) A custodian who executes an instrument of designation of his successor containing the custodian's resignation as provided in subsection (1) shall promptly do all things within his power to put each item of the custodial property in the possession and control of the successor custodian named in the instrument. The legal representative of a custodian who dies or becomes legally incapacitated shall promptly do all things within his power to put each item of the custodial property in the possession and control of the successor custodian named in an instrument of designation executed as provided in subsection (1) by the custodian or, if none, by the minor if he has no guardian and has attained the age of 14 years or in the possession and control of the guardian of the minor if he has a guardian. If the custodian has executed as provided in subsection (1) more than one instrument of designation, his legal representative shall treat the instrument dated on an earlier date as having been revoked by the instrument dated on a later date.

(4) If a person designated as custodian or as successor custodian by the custodian as provided in subsection (1) is not eligible, dies, or becomes legally incapacitated before the minor attains the age of 18 years and if the minor has a guardian, the guardian of the minor shall be successor custodian. If the minor has no guardian and if no successor custodian who is eligible and has not died or become legally incapacitated has been designated as provided in subsection (1), a donor, his legal representative of the custodian, or an adult member of the minor's family may petition the court for the designation of a successor custodian.

**History: En. Sec. 7, Ch. 245, L. 1957; amd. Sec. 6, Ch. 234, L. 1967; amd. Sec. 13, Ch. 423, L. 1971; R.C.M. 1947, 67-1807(part).**

**72-26-403. Rights and duties of successor.** A successor custodian has all the rights, powers, duties, and immunities of a custodian designated in a manner prescribed by this chapter.

**History: En. Sec. 7, Ch. 245, L. 1957; amd. Sec. 6, Ch. 234, L. 1967; amd. Sec. 13, Ch. 423, L. 1971; R.C.M. 1947, 67-1807(part).**

**72-26-404. Removal or bonding of custodian for cause.** (1) A donor, the legal representative of a donor, a successor custodian, an adult member of the minor's family, a guardian of the minor, or the minor, if he has attained the age of 14 years, may petition the court that for cause shown in the petition the custodian be removed and a successor custodian be designated or, in the alternative, that the custodian be required to give bond for the performance of his duties.

(2) Upon the filing of a petition as provided in this section, the district court shall grant an order, directed to the persons and returnable on such notice as the court may require, to show cause why the relief prayed for in the petition should not be granted and, in due course, grant such relief as the court finds to be in the best interests of the minor.

**History: En. Sec. 7, Ch. 245, L. 1957; amd. Sec. 6, Ch. 234, L. 1967; amd. Sec. 13, Ch. 423, L. 1971; R.C.M. 1947, 67-1807(e), (f).**

# CHAPTER 27

# MISCELLANEOUS PROVISIONS RELATING TO TRUSTS

### Part 1 — Charitable Trusts in Relation to Federal Tax Laws

Section
72-27-101. Special duties and restrictions on certain trustees.
72-27-102. Amendment of trust instrument by certain trustees.

### Part 2 — Prearranged Funeral Plans and Related Services—Mandatory Trust

72-27-201. Contract for prearranged funeral plan or related services — trust required — interest — exception.
72-27-202. Deposit of money — trust fund.
72-27-203. Report of institution holding deposited money.
72-27-204. Penalty.

## Part 1

## Charitable Trusts in Relation to Federal Tax Laws

**72-27-101. Special duties and restrictions on certain trustees.** Notwithstanding any provision to the contrary in the governing instrument or under any other law of this state and except as otherwise provided by court decree entered after March 28, 1974, the trustee of a trust, whenever created, which is or is treated as a private foundation or a split-interest trust as defined in sections 509 and 4947, respectively, of the Internal Revenue Code of 1954, as in effect on March 28, 1974, during the period it is or is treated as a private foundation or split-interest trust as so defined:

(1) shall not engage in any act of self-dealing as defined in section 4941(d) thereof;

(2) shall distribute the trust income for each taxable year at such time and in such manner as not to subject the trust to the tax on undistributed income imposed by section 4942 thereof;

(3) shall not, if section 4943 thereof is applicable, retain any excess business holdings as defined in subsection (c) of that section;

(4) shall not, if section 4944 thereof is applicable, make any investment in such manner as to subject the trust to tax under that section; and

(5) shall not make any taxable expenditure as defined in section 4945(d) thereof.

**History: En. 86-707 by Sec. 1, Ch. 332, L. 1974; R.C.M. 1947, 86-707(1).**

**72-27-102. Amendment of trust instrument by certain trustees.** (1) The trustee of a trust, whenever created, which is or is treated as a private foundation or a split-interest trust as defined in sections 509 and 4947, respectively, of the Internal Revenue Code of 1954, as in effect on March 28, 1974, may amend the terms of the governing instrument to the extent necessary to bring the trust into conformity with the requirements for:

(a) termination of private foundation status in the manner described in section 507(b) thereof;

(b) exemption of the trust from the taxes imposed by sections 4941 to 4945, inclusive, thereof, including the addition of a power to invade principal to the extent necessary to meet the requirements of section 4942; or

(c) exclusion of the trust from private foundation status under section 509(a)(3) thereof and for this latter purpose may release any power contained in the governing instrument, may reduce or limit the charitable organizations or classes of charitable organizations in whose favor a power to select may be exercised, and may appoint new or additional trustees.

(2) If the trust is for the benefit of one or more named charitable organizations, the trustee shall first obtain the consent of those organizations before making any amendment under subsection (1)(c).

**History: En. 86-707 by Sec. 1, Ch. 332, L. 1974; R.C.M. 1947, 86-707(2).**

## Part 2

## Prearranged Funeral Plans and Related Services — Mandatory Trust

**72-27-201. Contract for prearranged funeral plan or related services — trust required — interest — exception.** (1) In all cases when prior to his death a person or someone in his behalf makes a contract for the final disposition of his body under which contract, pursuant to a prearranged funeral plan, personal property will be delivered upon his death or the professional services of a funeral director, embalmer, cemetery firm, or mausoleum-columbarium corporation will then be furnished, all money paid under such contract shall be held in trust for the purpose for which it was paid until the obligation is fulfilled according to its terms or, by mutual consent of both parties to the contract, said money is refunded to the proper party.

(2) Accruals of interest upon this money are subject to this same trust.

(3) Such a trust is not necessary for that part of the contract that involves the sale of a cemetery lot if title is passed at the time the cemetery firm receives payment for the cemetery lot.

**History: En. Sec. 1, Ch. 232, L. 1953; amd. Sec. 1, Ch. 454, L. 1977; R.C.M. 1947, 86-701.**

**72-27-202. Deposit of money — trust fund.** (1) Within 30 days after receipt, the party to the contract holding said money in trust according to 72-27-201 shall deposit said money in a banking institution or invest said money in the stock of a savings or building and loan association organized under the laws of the state of Montana or of the United States of America and having its principal place of business in the state, the deposits of which banking institution or the stock liability of which savings or building and loan association are insured by an instrumentality of the federal government.

(2) Said deposits or investments shall be and constitute a trust fund for the benefit of the person who has contracted for such property and services upon his death. Such money shall be deposited in a separate account in the name of the depositor as trustee for the person who has contracted for such property and services upon his death.

**History: En. Sec. 2, Ch. 232, L. 1953; R.C.M. 1947, 86-702.**

**72-27-203. Report of institution holding deposited money.** A banking institution or savings or building and loan association receiving money in trust under 72-27-202 shall report to the department of business regulation before February 1 of each year all amounts received and held in trust. This report shall show the name and address of each trustee and cestui que trust, the principal amount remaining, and the interest or dividends paid on each such account.

**History: En. Sec. 3, Ch. 232, L. 1953; amd. Sec. 144, Ch. 431, L. 1975; R.C.M. 1947, 86-703.**

**72-27-204. Penalty.** Any person willfully violating the provisions of 72-27-202 shall be guilty of a misdemeanor and upon conviction therefor shall be punished as provided in 46-18-212.

**History: En. Sec. 4, Ch. 232, L. 1953; R.C.M. 1947, 86-704.**

## CHAPTERS 28 AND 29

## RESERVED

## CHAPTER 30

## MANAGEMENT OF INSTITUTIONAL FUNDS

### Part 1 — General Provisions

Section
72-30-101. Short title.
72-30-102. Definitions.
72-30-103. Uniformity of construction.

### Part 2 — Management of Funds

72-30-201. Endowment funds subject to appropriation and expenditure — net appreciation.
72-30-202. Determination of historic dollar value by institution conclusive.
72-30-203. Donor's intention restricting expenditure of net appreciation.
72-30-204. Allowable investments — retention of property.
72-30-205. Delegation of investment authority — advisory service.
72-30-206. Standard of care in management.
72-30-207. Release of restrictions in gift instrument.

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## Part 1

## General Provisions

**72-30-101. Short title.** This chapter may be cited as the "Uniform Management of Institutional Funds Act".

**History: En. Sec. 10, Ch. 389, L. 1973; R.C.M. 1947, 86-809.**

**72-30-102. Definitions.** In this chapter, the following definitions apply:

(1) "Institution" means an incorporated or unincorporated organization organized and operated exclusively for educational, religious, charitable, or other elee-

mosynary purposes or a governmental organization to the extent that it holds funds exclusively for any of these purposes.

(2) "Institutional fund" means a fund held by an institution for its exclusive use, benefit, or purposes but does not include:

(a) a fund held for an institution by a trustee that is not an institution; or

(b) a fund in which a beneficiary that is not an institution has an interest, other than possible rights that could arise upon violation or failure of the purposes of the fund.

(3) "Endowment fund" means an institutional fund or any part thereof not wholly expendable by the institution on a current basis under the terms of the applicable gift instrument.

(4) "Governing board" means the body responsible for the management of an institution or of an institutional fund.

(5) "Historic dollar value" means the aggregate fair value in dollars of:

(a) an endowment fund at the time it became an endowment fund;

(b) each subsequent donation to the fund at the time it is made; and

(c) each accumulation made pursuant to a direction in the applicable gift instrument at the time the accumulation is added to the fund.

(6) "Gift instrument" means a will, deed, grant, conveyance, agreement, memorandum, writing, or other governing document (including the terms of any institutional solicitations from which an institutional fund resulted) under which property is transferred to or held by an institution as an institutional fund.

**History: En. Sec. 1, Ch. 389, L. 1973; R.C.M. 1947, 86-801(part).**

**72-30-103. Uniformity of construction.** This chapter shall be so applied and construed as to effectuate its general purpose to make uniform the law with respect to the subject of this chapter among those states which enact it.

**History: En. Sec. 9, Ch. 389, L. 1973; R.C.M. 1947, 86-808.**

## Part 2

## Management of Funds

**72-30-201. Endowment funds subject to appropriation and expenditure — net appreciation.** (1) The governing board may appropriate for expenditure for the uses and purposes for which an endowment fund is established so much of the net appreciation, realized and unrealized, in the fair value of the assets of an endowment fund over the historic dollar value of the fund as is prudent under the standard established by 72-30-206.

(2) This section does not limit the authority of the governing board to expend funds as permitted under other law, the terms of the applicable gift instrument, or the charter of the institution.

**History: En. Sec. 2, Ch. 389, L. 1973; R.C.M. 1947, 86-802.**

**72-30-202. Determination of historic dollar value by institution conclusive.** The determination of historic dollar value made in good faith by the institution is conclusive.

**History: En. Sec. 1, Ch. 389, L. 1973; R.C.M. 1947, 86-801(part).**

**72-30-203. Donor's intention restricting expenditure of net appreciation.** (1) Section 72-30-201 does not apply if the applicable gift instrument indicates the donor's intention that net appreciation shall not be expended.

(2) A restriction upon the expenditure of net appreciation may not be implied from a designation of a gift as an endowment or from a direction or authorization in the applicable gift instrument to use only "income", "interest", "dividends", or "rents, issues, or profits" or "to preserve the principal intact" or a direction which contains other words of similar import. This rule of construction applies to gift instruments executed or in effect before or after July 1, 1973.

**History: En. Sec. 3, Ch. 389, L. 1973; R.C.M. 1947, 86-803.**

**72-30-204. Allowable investments — retention of property.** In addition to an investment otherwise authorized by law or by the applicable gift instrument and without restriction to investments a fiduciary may make, the governing board, subject to any specific limitations set forth in the applicable gift instrument or if the applicable law other than law relating to investment by a fiduciary, may:

(1) invest and reinvest an institutional fund in any real or personal property deemed advisable by the governing board, whether or not it produces a current return, including mortgages, stocks, bonds, debentures, and other securities of profit or nonprofit corporations, shares in or obligations of associations, partnerships, or individuals, and obligations of any government or subdivision or instrumentality thereof;

(2) retain property contributed by a donor to an institutional fund for as long as the governing board deems advisable;

(3) include all or part of any institutional fund in any pooled or common fund maintained by the institution; and

(4) invest all or any part of an institutional fund in any other pooled or common fund available for investment, including shares or interests in regulated investment companies, mutual funds, common trust funds, investment partnerships, real estate investment trusts, or similar organizations in which funds are commingled and investment determinations are made by persons other than the governing board.

**History: En. Sec. 4, Ch. 389, L. 1973; R.C.M. 1947, 86-804.**

**72-30-205. Delegation of investment authority — advisory service.** Except as otherwise provided by the applicable gift instrument or by applicable law relating to governmental institutions or funds, the governing board may:

(1) delegate to its committees, officers, or employees of the institution or the fund or agents, including investment counsel, the authority to act in place of the board in investment and reinvestment of institutional funds;

(2) contract with independent investment advisors, investment counsel or managers, banks, or trust companies so to act; and

(3) authorize the payment of compensation for investment advisory or management services.

**History: En. Sec. 5, Ch. 389, L. 1973; R.C.M. 1947, 86-805.**

**72-30-206. Standard of care in management.** In the administration of the powers to appropriate appreciation, to make and retain investments, and to delegate investment management of institutional funds, members of a governing board shall exercise ordinary business care and prudence under the facts and circumstances prevailing at the time of the action or decision. In so doing they shall consider long- and short-term needs of the institution in carrying out its educational, religious, charitable, or other eleemosynary purposes, its present and anticipated financial requirements, expected total return on its investments, price level trends, and general economic conditions.

**History: En. Sec. 6, Ch. 389, L. 1973; R.C.M. 1947, 86-806.**

**72-30-207. Release of restrictions in gift instrument.** (1) With the written consent of the donor, the governing board may release, in whole or in part, a restriction imposed by the applicable gift instrument on the use or investment of an institutional fund.

(2) If written consent of the donor cannot be obtained by reason of his death, disability, unavailability, or impossibility of identification, the governing board may apply in the name of the institution to the appropriate court for release of a restriction imposed by the applicable gift instrument on the use or investment of an institutional fund. The attorney general shall be notified of the application and shall be given an opportunity to be heard. If the court finds that the restriction is obsolete, inappropriate, or impracticable, it may by order release the restriction in whole or in part. A release under this subsection may not change an endowment fund to a fund that is not an endowment fund.

(3) A release under this section may not allow a fund to be used for purposes other than the educational, religious, charitable, or other eleemosynary purposes of the institution affected.

(4) This section does not limit the application of the doctrine of cy pres.

**History: En. Sec. 7, Ch. 389, L. 1973; R.C.M. 1947, 86-807.**

# CHAPTER 31

## MISCELLANEOUS PROVISIONS RELATING TO FIDUCIARIES

### Part 1 — General

Section
72-31-101. Oath in behalf of corporation acting as fiduciary.
72-31-102. Investment by fiduciaries in home owners' loan corporation bonds authorized.
72-31-103. Validation of fiduciary sales.

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### Part 1

### General

**72-31-101. Oath in behalf of corporation acting as fiduciary.** In all matters where a corporation is authorized to act as trustee, guardian, executor, administrator, or in any fiduciary capacity and an oath of office is required, it shall be competent for an officer of such corporation to take the required oath for and on behalf of his corporation, and such corporation shall thereby become amenable to the laws relating to individuals in like matters, so far as such laws may be applied to a corporation.

**History: En. Sec. 1, Ch. 15, L. 1905; re-en. Sec. 7194, Rev. C. 1907; re-en. Sec. 9828, R.C.M. 1921; re-en. Sec. 9828, R.C.M. 1935; R.C.M. 1947, 93-8713.**

**72-31-102. Investment by fiduciaries in home owners' loan corporation bonds authorized.** Notwithstanding any other provision of law, it shall be lawful for any executor, administrator, guardian or conservator, trustee, or other fiduciary to invest the funds or moneys in his custody or possession, eligible for investment, in bonds of the home owners' loan corporation or debentures issued by the federal housing administrator, guaranteed as to principal and interest by the United States government.

**History: En. Sec. 1, Ch. 5, Ex. L. 1933; amd. Sec. 1, Ch. 37, L. 1935; re-en. Sec. 5309.35, R.C.M. 1935; amd. Sec. 1, Ch. 24, L. 1937; R.C.M. 1947, 35-142(part).**

**72-31-103. Validation of fiduciary sales.** All sales, provided no action is pending on July 1, 1973, to set aside such deed or conveyance, by trustees, executors, administrators, and guardians which previous to January 1, 1973, were made to purchasers for a valuable consideration, which consideration has been paid by such purchasers in good faith, and such sales shall not have been set aside by the district or probate court having jurisdiction thereof, shall be sufficient to sustain a trustee's, executor's, administrator's, or guardian's deed or conveyance to such purchaser and, in case such deed or conveyance shall not have been given, shall entitle such purchaser to such deed or conveyance; and such deed or conveyance, if executed on July 1, 1973, or when executed, shall be sufficient to convey to such purchaser all the title that such beneficiary, decedent, or ward had in said real or personal property; and all irregularities in obtaining the order of the court for such sale and all irregularities or defects in making or conducting such sale by said trustee, executor, administrator, or guardian shall be disregarded, and such sale shall not be invalidated by reason of any such defect or irregularity.

**History: En. Sec. 1, Ch. 81, L. 1973; R.C.M. 1947, 91-4328.**

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